(9)

No. 01-175-CFX

Title: Spencer Williams, Judge, United States District Court for the Northern District of California, et al., Petitioners
v.
United States

Docketed:
July 30, 2001

Court: United States Court of Appeals for the Federal Circuit

Entry	Date	Proceedings and Orders
	Jul 27 2001	Petition for writ of certiorari filed. (Response due October 29, 2001)
	Jul 27 2001	Appendix of petitioner filed.
	Aug 14 2001	Order extending time to file response to petition until September 28, 2001.
	Sep 18 2001	Brief amicus curiae of American Bar Association filed.
	Sep 26 2001	Order further extending time to file response to petition until October 29, 2001.
	Sep 28 2001	Brief amicus curiae of American College of Trial Lawyers filed.
	Sep 28 2001	Brief amici curiae of National, State and Local Bar Associations filed.
	Nov 2 2001	Brief of respondent United States in opposition filed.
	Nov 13 2001	Reply brief of petitioners filed.
	Nov 14 2001	DISTRIBUTED for Conference of November 30, 2001
	Nov 29 2001	Letter from the Solicitor General received and distributed.
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	Feb 25 2002	REDISTRIBUTED for Conference of March 1, 2002
	Mar 4 2002	Petition DENIED. Dissenting opinion by Justice Breyer with whom Justice Scalia and Justice Kennedy join. (Detached opinion.)
		**********
	Mar 21 2002	Petition for rehearing filed.
	Mar 27 2002	DISTRIBUTED for Conference of April 12, 2002
	Apr 15 2002	Rehearing DENIED.

1 pp

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No. _____

In The

Supreme Court of the United States

SPENCER WILLIAMS, LOUIS C. BECHTLE, SANDRA S. BECKWITH, WILLIAM MATTHEW BYRNE, JR., ADRIAN G. DUPLANTIER, MORRIS E. LASKER, THOMAS COLLIER PLATT, JR., JOHN W. REYNOLDS, WALTER HERBERT RICE, MARVIN H. SHOOB, JOSEPH L. TAURO, LAUGHLIN E. WATERS, LEE R. WEST AND HENRY RUPERT WILHOIT, JR.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where Congress has enacted a law intended to protect judges' salaries from inflation by mandating salary adjustments to be received in the future, may a later Congress stop payment of those adjustments and thereby directly reduce the statutory salaries of Article III judges, without violating the Compensation Clause?

2. Whether this Court in *United States v. Will*, 449 U.S. 200 (1980), held that the Compensation Clause is to be read narrowly to protect only the salaries currently being received by judges?

PARTIES TO THE PROCEEDINGS

Petitioners, who were plaintiffs in the district court and appellees in the court of appeals, are Judges Spencer Williams, Louis C. Bechtle,* Sandra S. Beckwith, William Matthew Byrne, Jr., Adrian G. Duplantier, Morris E. Lasker, Thomas Collier Platt, Jr., John W. Reynolds, Walter Herbert Rice, Marvin H. Shoob, Joseph L. Tauro, Laughlin E. Waters, Lee R. West and Henry Rupert Wilhoit, Jr.

In addition, six judge plaintiffs in the original actions died while the cases were proceeding in the lower courts. They are: Judges Aubrey E. Robinson, Jr., C. Clyde Atkins, Lucius D. Bunton, III, Irving Hill, Joseph E. Stevens, Jr. and Charles Wiggins.

Respondent, United States of America, was a defendant in the district court and appellant in the court of appeals.

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* Judge Bechtle retired from active service pursuant to 28 U.S.C. § 371(a), effective June 30, 2001.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The decision of the United States District Court granting judgment for plaintiffs in case no. 97 CV 3106 (App. 103-31)[1] is reported at 48 F. Supp. 2d 52 (1999). A subsequent opinion granting judgment in a related case, no. 99 CV 1982 (App. 144-48), is not reported. The majority decision of the Court of Appeals for the Federal Circuit reversing those judgments (App. 1-41) and the dissenting opinion (App. 42-99) are reported at 240 F.3d 1019 (2001). A separate opinion by the panel majority concurring in the full court's order denying initial hearing *en banc* (App. 163-64) is reported at 240 F.3d 1366 (2001). Separate opinions dissenting from the court's order denying initial hearing *en banc* (App. 151-62) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 2001. A timely petition for rehearing was denied on April 30, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Compensation Clause of Article III, Section 1, of the United States Constitution provides that "[t]he

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[1] "App." refers to the separate, bound appendix to this petition.

Judges, both of the supreme and inferior Courts, . . . shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

Pertinent provisions of the Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716, and the statutes that barred payment of the annual cost-of-living adjustments in each year at issue are reproduced in the Appendix to this petition. (App. 169-80).

STATEMENT

1. In 1989 Congress enacted the Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716 [hereinafter "Ethics Reform Act"], a statute that significantly affected the compensation of federal judges. The statute adversely affected judges by imposing strict limitations on outside income they might earn from teaching or writing. Ethics Reform Act § 601 (codified at 5 U.S.C. app. §§ 501(a), 502) (App. 169-71). The statute also forbade the receipt of honoraria and imposed mandatory work loads on senior judges. *Id.* §§ 601 and 705 (codified at 5 U.S.C. app. § 501(b) and 28 U.S.C. § 375) (App. 170, 175-78). These limitations went into effect on January 1, 1991, and have applied to judges in each and every year since. In a related provision, designed, in part, to mitigate the adverse financial impact of these changes and to afford judges some protection from erosion of their compensation due to inflation, the Ethics Reform Act provided that judges would receive a cost-of-living adjustment ("COLA") each year, based on an index commonly used for this purpose, the Employment Cost Index, or ECI.[2] *Id.*

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[2] The ECI is a quarterly index of wages and salaries for private industry workers published by the Bureau of Labor Statistics. The Ethics Reform Act adopted the ECI less one-half percent as the measure of the appropriate adjustment. *See* Ethics Reform Act § 704(a)(1) (codified at 5 U.S.C. § 5318 note) (App. 173-74). It also capped any increase at 5 percent. *Id.*

§ 704(a)(2)(A) (codified at 28 U.S.C. § 461(a)) (App. 174-75). As discussed *infra*, the adoption of this index has the same legal effect as the adoption of a specific salary schedule for future years. *See infra* pp. 22-23.

The adoption of the Ethics Reform Act and its COLA provision came on the recommendations of the 1989 Commission on Executive, Legislative and Judicial Salaries ("1989 Quadrennial Commission") and a Bipartisan Task Force on Ethics which had been appointed by Congress. *See Report of the Bipartisan Task Force on Ethics on H.R. 3660, Government Ethics Reform Act of 1989*, 135 Cong. Rec. H30,740 (1989) [hereinafter "Task Force Report"]. The Task Force found that failure to implement cost-of-living adjustments under the prior law was "the single, most important explanation for the growing disparity between top salaries in government and the private sector, and the 38% loss of purchasing power by these officials since 1969." *Id.* at H30,753. The Task Force proposed that a new system be adopted that would provide for annual salary adjustments for judges and other high level government employees using the ECI as the appropriate measure. *Id.*

Congress followed this recommendation and mandated that payments under the new schedule commence on January 1, 1991. Ethics Reform Act § 704(b) (codified at 5 U.S.C. § 5318 note) (App. 175). The only condition to payment of the ECI adjustment for judges in any year was that the salaries of General Schedule employees be adjusted under the Federal Pay Comparability Act (5 U.S.C. § 5303 [hereinafter "Comparability Act"]), a statute

that provides a procedure for annually adjusting the salaries of federal employees under the General Schedule.

General Schedule salaries were adjusted under the Comparability Act for Fiscal Years 1991, 1992 and 1993 and, by operation of the Ethics Reform Act, judges' salaries were likewise adjusted in each of those years.

In Fiscal Year 1994, General Schedule salaries were not adjusted under the Comparability Act. Congress enacted a government-wide ban on any adjustments that year. Act of Oct. 28, 1993, Pub. L. No. 103-123, § 517B(a), 107 Stat. 1253. Thus, the sole condition for payment of the ECI adjustment to judges under the Ethics Reform Act was not met and, accordingly, judicial salaries were not adjusted.

In each of Fiscal Years 1995, 1996, 1997 and 1999, the sole condition for judicial ECI adjustments was satisfied, *i.e.*, the salaries of General Schedule employees were adjusted under the Comparability Act. Judges did not receive ECI adjustments, however, because Congress adopted, and the President signed, resolutions which purported to block payment of the scheduled COLAs.[3] These resolutions, referred to by the court of appeals as "blocking statutes" (App. 2), were contained in annual appropriations bills and applied only to judges, Members of Congress and a comparatively small group of policymaking positions included in the Executive Schedule. (*See* App. 57). Virtually all other federal employees received COLAs in each of the years at issue. Each of the blocking statutes acknowledged that the adjustments under the Comparability Act (the only condition for judges' COLAs) had taken effect. (*See infra* p. 24 n.17).

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[3] The four enactments that blocked these payments are set out in the Appendix. (App. 179-80).

While the resolutions purported to withhold the adjustments due judges under the Ethics Reform Act, the statute's related ban on honoraria and its limitations on other outside income continued to apply in each of the years at issue. (*See infra* pp. 13-14).

2. On December 27, 1997, twenty Article III judges filed suit against the United States in the District Court for the District of Columbia. The jurisdiction of the district court was invoked under 28 U.S.C. § 1346(a)(2) (the Little Tucker Act) and 28 U.S.C. § 1331 (federal question). (App. 85-86). In their complaint, the judges contended that they were entitled to the mandated COLAs for each of the years 1995, 1996 and 1997 because the blocking statutes adopted by Congress in each of these years reduced their compensation in violation of the Compensation Clause. (Complaint, Case No. 97 CV 3106 (*"Williams I"*)).[4] The judges also alleged that the refusal to pay COLAs to judges at times when COLAs were paid to millions of other career federal employees was discriminatory in violation of Article III. (App. 187-88). On plaintiffs' motion, a class was certified consisting of all persons who had served as Article III judges during the relevant periods. (App. 100-02).[5]

The parties filed cross-motions for summary judgment, and the district court entered summary judgment in favor of the plaintiff-judges on July 15, 1999. (App. 103-33). The district court held that the COLA mandated by the Ethics Reform Act is a protected component of judges' compensation, subject only to the condition in the

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[4] The pertinent portions of the complaint in *Williams I* are found in the Appendix. (App. 181-91).

[5] Although the judges of the courts below and the Justices of this Court have an interest in the outcome of these cases, no member of the Court is disqualified. *See United States v. Will*, 449 U.S. 200, 211-17 (1980).

statute, *i.e.*, that General Schedule salaries be adjusted. Therefore, the Acts of Congress which purported to block payment of these adjustments after all statutory prerequisites had been satisfied diminished judicial compensation and were invalid. On July 26, 1999, a similar case was filed by the same judges when Congress blocked payment of the 1999 COLA, despite the payment of General Schedule salary adjustments under the Comparability Act. (Case No. 99-1982 (*"Williams II"*)). The district court granted summary judgment in *Williams II* on December 29, 1999. (App. 136-37).

The government appealed both judgments to the Federal Circuit, and the appeals were consolidated for hearing and decision by that court. The jurisdiction of the Federal Circuit was invoked under 28 U.S.C. § 1295(a)(2).

3. A divided panel of the Federal Circuit reversed the judgments of the district court on February 16, 2001. (App. 1-41). All three members of the panel agreed with plaintiffs that, when the 101st Congress adopted the Ethics Reform Act, it intended to set salaries for 1991 and subsequent years by establishing "an automatic, *irreversible*, COLA-granting mechanism for federal judges, contingent only upon the grant of a COLA to the General Schedule." (App. 20 (emphasis supplied)). The full panel also agreed that the only condition for payment of the COLAs had been met in each year at issue before Congress enacted the blocking statute. (App. 20, 23). Thus, for example, before Congress moved to block payment of the 1995 COLA on September 30, 1994 (App. 179), judges' statutory salaries for Calendar Year 1995 had been adjusted (increased) by law and the blocking statute directly reduced that salary.

The panel majority held that this direct reduction in judges' statutory salary did not violate the Compensation Clause. They reasoned that, while one Congress may set

judicial salaries, a later Congress may change (reduce) those salaries without offending the Compensation Clause, so long as it does so before the amounts set are actually received by the judges. (App. 40). The panel majority believes that this is so because, under a "rule" they attribute to this Court by its opinion in *United States v. Will*, 449 U.S. 200 (1980) (*"Will"*), no element of judges' compensation to be received at a future date is protected by Article III. (App. 24-26). A sitting Congress is thus powerless to fix future salaries for judges, and legislative enactments that purport to do so are merely unenforceable "wish[es]." (App. 20). That related limitations on outside income remained in force and effect was deemed by the majority to be irrelevant because, in their view, Congress may limit or "reduce nonjudicial compensation" without offending the Compensation Clause. (App. 37).

The third member of the panel, Judge S. Jay Plager, dissented. Judge Plager wrote that, in his judgment, Congress has the power to fix future salary levels in a manner that protects those salaries from diminution and that, in holding otherwise, the panel majority misinterpreted this Court's opinion in *Will*. "[The majority opinion] is wrong because it attributes to the Supreme Court a misconstruction of the Constitution that the Court's opinion in *Will* neither supports nor deserves. . . . " (App. 42). Judge Plager also expressed the view, contrary to the majority, that the limitations on outside income were relevant factors in construing and applying the 1989 Act and that, so long as those limitations were in place, a later Congress could not withdraw the related COLA payments provided for by the same law. (App. 48).

Before the appeals court judgment was entered, a member of the Court suggested that the appeal be heard *en banc*. A majority voted not to consider the case *en banc*.

(App. 149-50). Three active members of the court (Chief Judge Mayer and Circuit Judges Newman and Rader) dissented. In written opinions,[6] these judges agreed with Judge Plager that the majority had misread *Will*, and they expressed the view that the decision of the district court should be affirmed. (App. 151-62).

4. On March 15, 2001, plaintiffs filed a petition for rehearing and suggestion for rehearing *en banc*. On April 30, 2001, the Federal Circuit denied both plaintiffs' petition for rehearing and their request for rehearing *en banc*. (App. 165-66). Judges Mayer, Newman and Rader again dissented. (*Id.*). After this Court issued its decision on May 21, 2001, in *United States v. Hatter*, No. 99-1978, 532 U.S. ___ (May 21, 2001), plaintiffs filed a motion for leave to file a second petition for rehearing and suggestion for rehearing *en banc* to allow the Federal Circuit to consider the application of this Court's decision in *Hatter* to the decision in this case. That motion was denied on May 29, 2001. (App. 167-68).

REASONS FOR GRANTING THE PETITION

This case is the most important Compensation Clause case ever to come before this Court. The decision of the majority below is the first to allow a Congress to directly reduce judicial pay once that pay has been enacted into law.[7] This holding alone should cause concern sufficient

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[6] Chief Judge Mayer issued a dissenting opinion in which Judges Newman and Rader joined. (App. 151-58). Judge Newman issued a separate dissenting opinion in which Chief Judge Mayer and Judge Rader joined. (App. 159-62).

[7] *United States v. Hatter*, No. 99-1978, 532 U.S. ___ (May 21, 2001), *O'Malley v. Woodrough*, 307 U.S. 277 (1939), *Miles v. Graham*, 268 U.S. 501 (1925), and *Evans v. Gore*, 253 U.S. 245 (1920), involved indirect reductions in judicial compensation as a result of taxation. In *Booth v. United States*, 291 U.S. 339 (1934), and *O'Donoghue v. United States*, 289 U.S. 516 (1933), the issue was whether certain judicial offices were covered by Article III; Congress had reduced the salaries of all government employees, but acknowledged that it could not reduce the salaries of Article III judges. In *United States v. Will*, 449 U.S. 200 (1980), the issue was whether certain adjustments had become law and, therefore, part of the statutory salary of a judge. (*See infra* pp. 25-28).

to merit review by this Court. But the ruling here is of special concern because the panel majority attributes every aspect of their holding to the teachings of this Court in *United States v. Will*, and they have called upon this Court to review and reverse their decision if they are wrong. (App. 164). The panel majority's reading of *Will* is clearly wrong. If allowed to stand, without review by this Court, their decision will be read as *the* authority on the protective limits of Article III, even though a number of judges on the Federal Circuit disagree with the panel majority's erroneous reading of *Will*. (*See infra* p. 14).

The COLA provisions, which the panel majority found to be unenforceable, were enacted by Congress at the urging of many organizations and institutions interested in enhancing the quality and independence of the Judicial Branch, including The Judicial Conference of the United States. (*See infra* pp. 19-22). These proponents emphasized that COLAs were essential to preserve the quality and independence of the judiciary.

The 101st Congress responded to these concerns by enacting the COLA provisions of the Ethics Reform Act. The majority decision below has nullified this commendable effort by that Congress. In the process, the majority has relegated the Judicial Branch to a permanent state of subservience and dependence.

I. THE MAJORITY OPINION UNDERMINES JUDICIAL INDEPENDENCE AND THE POWER OF CONGRESS TO PROMOTE THAT INDEPENDENCE.

The panel majority recognizes that the Ethics Reform Act mandated that the salaries of Article III judges were to be adjusted in each of the years at issue and that all conditions for payment of those adjustments had been satisfied. (App. 20, 23). The majority concluded, however, that Congress has the power to bar the mandated adjustments and thereby reduce judicial salaries, so long as it does so before the mandated salary is actually received. Thus, contrary to the commands of this Court that the Compensation Clause be read broadly, in a way that achieves its objectives (*e.g., O'Donoghue v. United States*, 289 U.S. 516, 530-33 (1933)), the panel majority adopted the narrowest possible reading of the Clause; it protects only a judge's current salary as reflected by his or her "paycheck[ ]." (App. 25).

The fundamental error of the decision below rests on the premise that no element of compensation to be received in the future can be protected by the Compensation Clause. Under the panel majority's construction of the term "compensation," as it appears in Article III, Section 1, Congress is powerless to establish an irrevocable future rate of pay for judges. So long as the majority decision survives, judges and prospective judges can *never* be assured that their salaries will be protected from inflation, no matter how clearly Congress may express its intention to provide such protection. By the same logic, retirement benefits measured by a judge's salary at the time of retirement (*see, e.g.*, 28 U.S.C. § 371) can be eliminated at any time before the judge's retirement, since retirement benefits are neither determined nor payable until the judge retires. To this extent, at least, the majority

decision is in direct conflict with this Court's recent decision in *United States v. Hatter*.[8]

The panel majority, of course, recognizes that Congress can, when fixing salaries, provide for payments to be received in future years. The panel majority believes, however, that – under their interpretation of the rule of *Will* – such future payments are always subject to rescission because the power of Congress to fix salaries includes the power to change (or repeal) the salaries fixed by an earlier Congress. (App. 40). According to the panel majority, any enactment fixing a salary level to be received at a future date is an unenforceable "wish" (App. 20) that can be honored or repudiated by a later Congress. This principle, too, they say, is part of the "rule" in *Will*. (App. 25).

Petitioners recognize that, as a general rule, legislation enacted by one Congress can be rescinded by a later one. But this rule is not absolute. As this Court explained in *United States v. Winstar Corp.*, 518 U.S. 839 (1996), there are many exceptions, particularly where a right or entitlement has been created by the initial enactment. The majority's application of the rule (as an absolute one) overlooks the fact that Article III was specifically designed and intended to limit the power of Congress to

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[8] The Opinion of the Court in *Hatter* recognized that more than salary was protected. It identified a salary reduction as merely one example of an unconstitutional diminution, noting that the "Compensation Clause offers protections that extend beyond [reductions in salary]." *Hatter*, slip op. at 10. *See also id.* at 15 (non-contributory pension benefits are part of judges' compensation). Justice Scalia's separate opinion, concurring in part and dissenting in part, was more specific: "the term 'compensation' refers to the entire 'package' of benefits – not just cash, but retirement benefits, [and] medical care. . . ." *Id.* at 3 (Scalia, J., concurring in part, dissenting in part).

change a law where such a change directly or indirectly reduces judges' compensation. The decision below relegates judges' rights (and the public interest) under Article III to something less than contract rights, which this Court ordered enforced in *Winstar*.

The majority's holding, of course, has grave implications for the quality of justice in our country. If no salary or other benefit to be received in the future is protected by Article III, the recruitment and retention of judges will be hampered and the independence of the Judicial Branch will be compromised. The panel majority acknowledged that this reading was "regrettable" (App. 25, 41), but they concluded that it follows from "the rule of *Will*" (*id.*).

To validate their holding, the panel majority misconstrued, to the point of distortion, a number of critical statements in the Court's Opinion in *Will*. For example, the *Will* Court used the term "vested" to explain when an element of compensation becomes constitutionally protected. The majority below acknowledged that vesting is a future interest concept and that "garden variety future interests" law supports the plaintiff-judges' argument, *i.e.*, vesting occurs from the date of statutory enactment. (App. 24, 36). The majority concluded, however, that the *Will* Court "departed from the traditional vesting rules" and adopted a special rule, applicable only in Compensation Clause cases, that makes vesting synonymous with "*actual possession.*" (App. 24 (emphasis in original)). Of course, if the *Will* Court had intended "vested" to mean "in possession" (the ultimate *present* interest), it would not have used a term commonly used to define a *future* interest. Certainly, it would not have done so without explaining that it was "depart[ing] from traditional vesting rules . . . ," as the majority believes. (*Id.*).

The panel majority reached their conclusions, in large part, based on this Court's statements in *Will* (1) that

Congress may "alter a procedure for calculating salaries" before that procedure is "executed" (meaning before the salaries are fixed); and (2) that the Court cannot "command Congress" to carry out a "future intent" with respect to salaries (meaning courts cannot compel Congress to enact a law). 449 U.S. at 228. But here, petitioners are not claiming that Congress should be compelled to enact a law (Congress did so when it enacted the Ethics Reform Act); petitioners are asking that a duly enacted law be enforced.

The majority's interpretation of the Compensation Clause also dismisses as irrelevant the fact that the same law that mandates COLAs imposes limitations on judicial income from outside sources. The majority chose to disregard the income limitations because, in their view, there is no limit on the powers of Congress to reduce any "nonjudicial" compensation of judges; Article III protects only judicial compensation. (App. 37). Presumably then, Congress may limit or reduce judges' outside income in any way it desires without offending the Compensation Clause; it could even prohibit judges from receiving income from privately held investments. And, under the majority's view, Congress could do so while withholding otherwise authorized benefits intended to offset the limitations. These inequitable circumstances were dismissed by the majority as merely a part of the "harsh bite" of *Will*. (App. 27).

The panel majority admits the obvious: their holding deals a devastating blow to the morale and vitality of the judiciary, which depends upon "a deliberate, consistent, and fair approach to routine cost-of-living salary adjustments." (App. 41). They also admit that the holding is contrary to the clear intent of the 101st Congress when it adopted the Ethics Reform Act. (App. 20). The majority found, however, that "so long as the Supreme Court

permits the rule of *Will* to survive," there is no judicial remedy to enforce the mandates of the Ethics Reform Act. (App. 25-26).

In his dissenting opinion, Judge Plager demonstrated that the majority had misread *Will* (App. 46-52) and had failed to apply the Compensation Clause as intended by the Founders. (App. 79-85). At least three other judges of the Federal Circuit agreed with Judge Plager. They urged that the Federal Circuit hear the case *en banc* and they took the extraordinary step of issuing dissenting opinions from the decision not to do so. (App. 151-62). In their dissents, they underscored the vital importance of the case and they convincingly articulated the reasons why the majority opinion was wrong. Thus, four of the six members of the Federal Circuit who expressed an opinion on the merits agreed that the legislation that stopped payment of COLAs mandated by the Ethics Reform Act diminished judges' pay in violation of the Compensation Clause. All four dissenting judges agreed that there was nothing in this Court's opinion in *Will* that compelled the result reached by the panel majority.[9]

The panel majority responded to the dissenting opinions by asserting that, if they have misread *Will*, "the Supreme Court will have the opportunity to correct the error." (App. 164). Petitioners respectfully submit that the panel majority's call for help in this regard must be heeded.

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[9] The fact that distinguished jurists do not agree on the proper interpretation of such an important case (*Will*) is, in and of itself, justification for review.

II. THE ECI ADJUSTMENTS MANDATED BY THE ETHICS REFORM ACT ARE A VESTED COMPONENT OF JUDGES' COMPENSATION AND ARE PROTECTED BY ARTICLE III.

Petitioners respectfully submit that this Court should grant review because the district court and the dissenters in the court of appeals are correct: Article III protects judges' statutory compensation, including those portions of that compensation not currently being received.

A. The Legislative And Executive Branches Have The Power To Preserve The Independence Of The Judiciary And To Promote The Purposes Of Article III By Legislating Future, Inflation-Based Salary Adjustments.

The purpose of Article III, Section 1 was to perfect the basic plan of the Constitution to make each branch of government separate from and independent of the others. The Framers recognized that nothing less than tyranny would result if one branch could control or dominate another, particularly the judiciary. *See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 57-58 (1982) (quoting *The Federalist* No. 47 (James Madison)).

As this Court explained recently in its opinion in *United States v. Hatter*, the Founders were aware, from firsthand experience, that judges would not be independent if either the Executive or Legislative Branch could control their tenure or compensation. *See Hatter*, slip op. at 8-10.

In *Hatter*, this Court cited and quoted the most reliable sources of the drafters' intent, Alexander Hamilton and James Madison, to show that the Compensation Clause was designed to free judges from dependence on the legislature for the maintenance of their compensation. *See* slip op. at 8-9. Hamilton knew that *"a power over a*

man's subsistence amounts to a power over his will." The Federalist No. 79, at 472 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis in original). Thus, he observed: "Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support." *Id.*

Madison gave a similar account of the Convention's thinking and warned of a dependence on the legislature because of its discretion over the "pecuniary rewards" of the other departments, which gives the legislature "greater facility to encroachments" upon the others. *The Federalist* No. 48, at 310 (James Madison). Madison also made it clear that "emoluments annexed to their Offices," not just salary, were to be protected. *Id.* No. 51, at 321. The Founders therefore resolved "to put it out of the power of [the Legislative Branch] to change the condition of the individual [judge] for the worse." *Id.* No. 79, at 473 (Alexander Hamilton).

Petitioners submit that our courts, particularly this Court, have promoted these objectives through the application of a straightforward principle announced almost two hundred years ago in the first reported case to consider the Compensation Clause: Once a component of judges' pay is enacted into law it "vests" or becomes a part of judges' compensation protected by Article III. *United States v. More*, 7 U.S. (3 Cranch) 159 (C.C.D.C. 1803) (Marshall, C.J. concurring):[10] In that court's words: "[I]f his compensation *has once been fixed by law*, a subsequent law for diminishing that compensation . . . cannot affect [a sitting judge] . . . " *Id.* at 161 (emphasis supplied).

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[10] Chief Justice Marshall sat on the appellate panel and concurred in the opinion of the court.

This same principle was announced by this Court in the first Compensation Clause cases to come before the Court. *Evans v. Gore*, 253 U.S. 245 (1920) and *Miles v. Graham*, 268 U.S. 501 (1925). Although these cases were subsequently overruled for their specific holdings (that judges' salaries could not be taxed), the underlying principles espoused by the Court there, particularly in *Evans*, continue to define the scope and meaning of the Compensation Clause. *See* discussion in *Hatter*, slip op. at 8-10.

In *Evans*, the Court defined broadly the compensation to be protected against *all* forms of diminution: "But all which by their necessary operation and effect withhold or take from the judge *a part of that which has been promised by law* for his services must be regarded as within the prohibition. Nothing short of this will give full effect to its spirit and principle." 253 U.S. at 254 (emphasis supplied).

Miles added to the discussion of *Evans* by describing further the compensation "promised by law."

> The words and history of the clause [article III, section 1] indicate that the purpose was to impose upon Congress the duty definitely to *declare what sum shall be received* by each judge out of the public funds *and the times for payment*. When this duty has been complied with *the amount specified becomes the compensation which is protected* against diminution during his continuance in office.

Miles, 268 U.S. at 508-09 (emphasis supplied).[11]

Petitioners respectfully submit that this Court's opinion in *Will* is consistent with these principles. In *Will*, salary adjustments that were established by law were protected. (*See* discussion *infra* pp. 25-28). Congressional

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[11] This description is quoted with approval in *Atkins v. United States*, 556 F.2d 1023, 1044, 1060 (Ct. Cl. 1977).

efforts to repeal adjustments fixed by law were held invalid because they "purported to revoke an increase in judges' compensation *after* those *statutes* had taken effect." *Will*, 449 U.S. at 230 (emphasis supplied).

Petitioners further submit that this protection extends to salaries *fixed*, but not yet received, particularly where, as here, the intention of Congress in setting the future salary level is to preserve the real value of judges' pay. There is nothing in this Court's opinion in *Will* to suggest otherwise. To the contrary, the Court in *Will* (and again in *Hatter*) pointed out that the Founding Fathers were "well aware of the phenomenon of inflation" and were concerned that inflation could compromise the independence of the judiciary. *Will*, 449 U.S. at 219-20; *see Hatter*, slip op. at 21. The Founders decided against adopting an indexing scheme in the Constitution, however. Instead, they left it to the discretion of Congress to adjust judicial salaries as circumstances require. *Hatter*, slip op. at 21. The *Will* Court pointed to this history and concluded that the Court could not *require* Congress to adopt an indexing scheme. *See* 449 U.S. at 228 n.33. The Court did not say or even imply that Congress could not elect to do so or otherwise fix future salaries to protect the judiciary from inflation.

B. Unlike The Process Established By The Prior Law, The Ethics Reform Act Provided For Cost-Of-Living Adjustments By Legislating Future Salary Levels.

The Ethics Reform Act was only the second attempt by a Congress to deal with the impact of inflation on judges' salaries. The first attempt was the 1975 Adjustment Act, Pub. L. No. 94-82, 89 Stat. 419 (1975), the statute at issue in *Will*. That effort did not work, primarily because the adjustments anticipated by that system

were not automatic or guaranteed. The 1989 Act was designed to cure that deficiency.[12]

Proponents of the Ethics Reform Act pointed out that Congress' failure to provide COLAs posed a threat to the quality and independence of the federal bench. The Judicial Conference of the United States passed a unanimous resolution urging Congress to address the problem of inadequate pay for judicial officers. *See* 135 Cong. Rec. H5262 (1989). This issue was described as the "single greatest problem facing the Judicial Branch today." *Id.* The Judicial Conference resolution called for an increase in judicial salaries and the enactment of measures that would "assure that judicial officers receive . . . [COLAs] similar to those received by other government personnel." *Id.* The Resolution noted that judges' loss of purchasing power made it increasingly difficult to attract and retain highly qualified people on the bench and undermined the concept of life tenure. *Id.*

The 1989 Quadrennial Commission and the Bipartisan Task Force on Ethics, the special committee whose recommendations resulted in the Ethics Reform Act (*see* App. 74-79, 117), issued reports in which they expressed similar concerns. *See* Report of 1989 Commission on Executive, Legislative and Judicial Salaries, *Fairness for our Public Servants* at 27 (1988) (the loss of purchasing power of judicial salaries is "threatening to diminish the quality

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[12] The panel majority sees no substantive differences in the two Acts. (Like the 1989 Act, the 1975 Act "guaranteed an annual automatic COLA. . . . " (App. 29)). The Court in *Will* held to the contrary: the 1975 Act guaranteed nothing. (*See infra* p. 26). As the dissents point out, the majority's failure to see the vital differences in the two statutes is, in large part, the basis for their misapplication of this Court's decision in *Will*. (App. 52; 151-58).

of justice in this country. . . . ") [hereinafter "1989 Quadrennial Commission Report"]; Task Force Report, 135 Cong. Rec. H30,752 (1989) (as a result of this loss of purchasing power, "Federal Judges are resigning at a higher rate than ever before. . . . "). The principal cause of the crisis described by these Reports was the ineffectiveness of the then existing procedures for annually adjusting judges' pay. The 1975 Adjustment Act did not actually fix pay, it merely provided a vehicle for Congress to do so each year, by tying judicial salaries to the process used to annually adjust the salaries of General Schedule positions. *See id.* at H30,752; *Will*, 449 U.S. at 203.[13] Under this process, the President was to submit a recommendation, based on the report of an agent, or an Alternative Plan, prior to September 1. The President's plan would become law unless it was vetoed by either House of Congress within thirty days.[14] *Id.* During that period, the President's recommendation was subject to "Congressional acceptance, disapproval or modification." 1989 Quadrennial Commission Report at 35. Until September 30, therefore, there was no law in place fixing the new salaries. The statutes increasing salaries took effect October 1 of each year. *Will*, 449 U.S. at 230; *American Fed'n of Gov't Employees, AFL-CIO v. Reagan*, 806 F.2d 1034, 1041 (Fed. Cir. 1986).

The Task Force Report found that this procedure of annually fixing the new salary levels subjected judges to

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[13] The Court in *Will* described this procedure and explained that, in adopting the 1975 Adjustment Act, Congress did not "alter the *compensation* of judges; it modified only the *formula* for determining the compensation." 449 U.S. at 227 (emphasis in original).

[14] The one house veto provision was later held unconstitutional. *American Fed'n of Gov't Employees, AFL-CIO v. Reagan*, 806 F.2d 1034 (Fed. Cir. 1986).

"political gamesmanship" (135 Cong. Rec. H30,752) and made judges "vulnerable to . . . riders to appropriations bills to deny them COLAs when other Federal employees receive theirs." *Id.* at H30,753. The Task Force proposed, therefore, that a new system be adopted to eliminate the gamesmanship and to ensure that judicial COLAs are actually paid.

To be clear, the need for a law that actually fixed future salaries went beyond the important goal of extricating judges' pay from the political pressures that led to congressional actions barring their payment in several years. The 1975 Adjustment Act posed a problem for the Legislative Branch as well. In 1989, ratification of the 27th Amendment[15] was imminent. This Amendment would prevent Congress from enacting a pay increase for Members of Congress that would "take effect" during a current term. In other words, the legislative authority to adjust congressional salaries would have to be enacted in a year separated (with an election intervening) from the year the increases were received. Thus, Congress would no longer be able to receive COLAs under the 1975 Adjustment Act because, as *Will* held, a separate statute setting salaries (based on the President's submission) went into effect each year. Accordingly, there could be no intervening election between the effective date and the date the salaries were received. It was imperative, therefore, that the entitlement to future COLAs be "in place" before the years in which those increases would be received. (*See* discussion *infra* pp. 22-23).

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[15] The 27th Amendment provides: "No law, varying the compensation [of Members of Congress], shall take effect until an election of Representatives shall have intervened." U.S. Const., amend. XXVII.

The Task Force urged automatic annual COLAs beginning January 1, 1991. The Task Force also recommended that limitations be imposed on the outside income that could be earned by a judge from teaching or writing and urged that honoraria be prohibited. Significantly, these limitations were "interrelated" to the COLAs. *See* 135 Cong. Rec. S29,686 (1989) (statement of Sen. George Mitchell); *see also* 135 Cong. Rec. H29,484 (1989) (statement by Task Force Co-Chair, Rep. Lynn Martin: "a comprehensive and interrelated package . . . one-bill indivisible."); *Boehner v. Anderson*, 809 F. Supp. 138, 141 (D.D.C. 1992).

Congress adopted the recommendations of its Task Force by passing the Ethics Reform Act on November 30, 1989. The new law represented a "fundamental departure from the [prior] system." Task Force Report, 135 Cong. Rec. H30,752. Whereas, under the 1975 Act, judges were merely "eligible"[16] for annual adjustments, the new Act would lawfully provide for these adjustments. *Id.* at H30,757. The payment of annual COLAs to judges was now mandated by statute, subject only to the condition that the salary levels of General Schedule employees be adjusted in the same year.

The first judicial interpretation of the new Act came in *Boehner v. Anderson*, 30 F.3d 156 (D.C. Cir. 1994), a suit alleging that, as to Members of Congress, the new COLA provision violated the 27th Amendment. The plaintiffs in that case argued that each COLA was a separate legislative act which "varied the compensation" during a current term. *Id.* at 161. The Executive Branch, the Senate and the House appeared in *Boehner* and opposed the suit.

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[16] Despite this clearly expressed intent to change the law, the panel majority found that, under the new Act, judges are still merely "eligible" for increases. (App. 11).

All argued that, unlike the 1975 Adjustment Act, each annual adjustment under the Ethics Reform Act was not a new law varying pay because the COLA provisions of the Ethics Reform Act became law [were fixed] in 1989. Thus, the Congress sitting *at that time* properly fixed the salaries of future Congresses.

The court of appeals in *Boehner* agreed with the Executive and Legislative Branches and held that the 1989 Act fixed future salaries. *Id.* at 162. The court noted that one Congress could specify the salary of a future Congress, and the Court saw "no reason whatsoever why Congress cannot specify an index or formula" instead of a specific dollar amount. *Id.* The court concluded: "In sum, it has been the law since 1989 that a COLA would be made on January 1, 1991, and each year thereafter. . . . " *Id. See also Shaffer v. Clinton*, 54 F. Supp. 2d 1014, 1025 (D. Colo. 1999) (same).

As a matter of statutory interpretation, the opinions of the panel majority and the dissenters below fully agree with the *Boehner* court: the government's commitment to pay annual COLAs to the judiciary is chiseled in legislative stone. As the panel majority explained, the intent of Congress that these payments be made was "clear and beyond any possible doubt: federal judges were to receive COLAs . . . whenever COLAs were awarded to the General Schedule." (App. 35). Under the new Act, "once a determination was made by Congress in a given year that a COLA would be paid to federal employees in the General Schedule, a COLA *became payable* to federal judges." (App. 3 (emphasis supplied)).

The majority below held, however, that, for Compensation Clause purposes, Congress' intention to set future salary levels was irrelevant; the COLA mandated by the 1989 Act was merely a "wish" (App. 20), because it could be repealed or suspended by a later Congress, even after

the condition for payment of a COLA in any year had been satisfied and the COLA had *become payable*.

The panel majority acknowledged that, in each of the years in issue, the condition for payment had been satisfied: "everything necessary" for the statutorily mandated payments had occurred before the blocking legislation was passed, "except for the passage of time. . . . " (App. 23). Thus, before Congress moved to block payment on September 30, 1994 (App. 179), the lawful salary for a district judge for calendar year 1995 was set at $136,300. The blocking statute had the effect of reducing judges' statutory salaries to the 1994 levels.[17] The panel majority held that this direct reduction of judges' pay did not violate the Compensation Clause because the "rule of *Will*" simply "overwhelm[s] the intent" of the 101st Congress (App. 36), and allows a later Congress to reduce judges' statutory salaries so long as it does so before judges begin receiving the new level (*e.g.*, $136,300) in their "paychecks" (App. 25).

Petitioners submit that the panel majority below has misread *Will* and respectfully urge this Court to correct that error. Petitioners further pray that, if the panel majority has read *Will* correctly, this Court should overrule any part of that decision that prevents Congress from establishing by law a future pay adjustment for judges to remedy salary erosion caused by inflation.

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[17] The blocking statutes acknowledged, by their language, that the General Schedule adjustments had taken effect: "No adjustment [under the Comparability Act] shall be considered to have taken effect." (App. 179-80). In significant contrast to this case, the repealing statutes in *Will* referred to the COLA implementations in the future tense, the adjustments, which ordinarily go into effect on October 1, "shall not take effect." 449 U.S. at 206-07.

C. *Will* Does Not Hold That The Compensation Clause Protects Judges' Current Salaries Only.

In *Will*, this Court was called upon to interpret the 1975 Adjustment Act. That Act was designed to provide comparability payments to judges and others. But, in certain years, the then-sitting Congress enacted legislation to prevent the operation of the Adjustment Act. The plaintiffs in *Will* argued that these statutes diminished their compensation and were, therefore, unconstitutional. Their theory was that, when the 1975 Act was adopted, future salaries were fixed by that enactment and could not, therefore, be withdrawn. In response, the government argued that the adjustments were not protected because they had not yet taken effect. (Brief of United States, pp. 20-21, 51-59).

It is significant here that in *Will* the government did not argue that increases were not protected until they were received. To the contrary, in both his opening and reply briefs, the Solicitor General acknowledged that the Compensation Clause protects not only compensation actually received, but also amounts not yet paid so long as the statute providing the benefit is in effect.

> Nor do we contend that the Compensation Clause is limited to compensation that has already been paid. . . . Again, as noted in our opening brief (U.S. Br. 56 n.47), "the Compensation Clause extends to elements of judges' compensation *that have gone into effect but have not yet been paid*. . . . "[18]

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[18] In *Hatter*, the Solicitor General again described the compensation protected by Article III as "Judges' Salary Stated In Law" (Brief of the United States, p. 28) and described this Court's holding in *Will* as follows: "In *Will*, the Court held that Congress may not withdraw an increase in statutory judicial

(Reply Brief for the United States, p. 11 n.16 (emphasis supplied)).[19]

In determining what is and what is not protected compensation, the *Will* Court invoked a well-known future interest concept, "vesting," to describe the point at which a judge's right to each annual adjustment would attach under the statute before the Court. It posed the question it had to resolve: did the increases provided for by the 1975 Act vest "when the formula was enacted or when the increases took effect?" 449 U.S. at 221. The Court then carefully analyzed the statute that created the formula to determine whether Congress intended to fix future salaries or to merely provide a vehicle for future Congresses to do so when inclined to invoke the formula. *Will*, 449 U.S. at 227-28. The Court concluded that the 1975 Adjustment Act did not fix future salaries, but was merely a vehicle for doing so. No rights vested, therefore, when the Adjustment Act was adopted. The plaintiffs in *Will* thus failed in their primary premise, *i.e.*, that the adoption of the formula itself created an entitlement, protected by the Compensation Clause.

This ruling did not terminate the plaintiffs' case, however. Even if the enactment of the formula did not establish a protected right, implementation of the formula in any given year could. In certain of the years at issue in *Will*, Congress and the President had invoked the formula and had fixed judicial salaries for those years, before the nullifying statute was adopted. For example, for FY 1980

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salaries once it has gone into effect, but that Congress may cancel a prospective statutory salary increase before it takes effect." (*Id.*, p. 21).

[19] The Solicitor General was responding to arguments by the plaintiffs and their amicus that accused the government of taking a cash-in-hand approach, similar to that adopted by the majority below.

(Year 4 in the Court's opinion), the nullifying statute was not enacted until October 12, 1979, twelve days after the President's recommendation became law. The nullifying statute was invalid because it purported to revoke an increase in judges' compensation after the statute establishing the increase had taken effect. *Id.* at 230. The plaintiffs prevailed in another year (Year 1) for the same reason. *Id.* The salary increase was "already in force" and could not be reduced. *Id.* at 225.

In the other two years considered by the Court in *Will* (Years 2 and 3), the statutes that prevented operation of the Adjustment Act were enacted *before* the law fixing the new salary levels went into effect on October 1. There was, thus, no increase "in force" in those years. *Id.* at 224-25.

Petitioners respectfully submit that there is only one conclusion that can follow from a reading of the *Will* Court's decision in light of the history and purposes of the Compensation Clause: Once compensation of an Article III judge has been fixed by law, that compensation "vests", *i.e.*, becomes the compensation which is protected against diminution. (*See supra* pp. 16-18).

The panel majority reads this Court's opinion in *Will* to hold that no rights vest until the new salary is *received*.[20] But, the *Will* Court never said that. Moreover,

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[20] Under the 1975 Act, salary adjustments became law at 12:00 a.m. on October 1 of each year. For judges, who are paid on a monthly basis, the newly enacted increases began to accrue later that same day. The Court held in *Will* that adjustments could not be blocked after 12:00 a.m. on October 1. The panel majority assumes that the basis for the Court's ruling was that the new salaries began to accrue on October 1. They attach no special significance to the fact that the increases *became law* earlier that day. But, as demonstrated above, it is the legal entitlement, not the receipt, that is crucial to vesting.

the Court's use of the concept of "vesting" recognized that entitlements due in the future can nonetheless be vested. The "rule" the panel majority finds in *Will* – requiring "actual possession" before vesting – is simply not there.

Moreover, if the *Will* Court had intended to hold that only current salary is protected, it would not have gone to the effort of analyzing the 1975 Act to determine whether that Act actually fixed salaries or was merely a "method" for doing so. *See* 449 U.S. at 228. Under the panel majority's reading of *Will*, this analysis was a meaningless exercise. The Court could simply have said that legislatively-mandated salary increases are not protected until *actually possessed*.

As the dissenting opinions here demonstrate, the Ethics Reform Act is different from the statute before the Court in *Will* in every relevant respect. The future adjustments under the Ethics Reform Act were fixed by law when that statute was enacted. The right to the adjustments mandated by that Act, therefore, vested when that statute became law or, at the latest, when the one condition for payment (adjustment of General Schedule salaries) occurred.[21]

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[21] The district court held that judges' entitlement to annual COLAs under the Ethics Reform Act "vested on January 1, 1991 [the effective date of the Act], subject to only one condition, that such an adjustment be given to General Schedule employees for the same year." (App. 131). Petitioners also argued, in the alternative, that vesting occurs each year when the condition is fulfilled. Since, in each of the years at issue, the condition was met before the blocking statute was enacted, petitioners would prevail under either argument.

III. THE BLOCKING STATUTES DISCRIMINATE AGAINST JUDGES IN VIOLATION OF ARTICLE III.

This Court should grant review because the challenged statutes discriminate against judges in violation of Article III, Section 1. In their complaint, petitioners alleged that the refusal to pay COLAs to judges at times when COLAs were paid to millions of other career federal employees was discriminatory in violation of Article III. (App. 187-88). In its recent opinion in *Hatter*, the Court explained that the Compensation Clause protects judges from discriminatory treatment in matters relating to compensation. Slip op. at 14.

In each of the years at issue in this case, virtually every federal employee, including rank and file military personnel and General Schedule employees, received a pay adjustment. Out of these millions of employees, only judges, Members of Congress and a relatively small number of other high ranking employees were denied COLAs. By treating judges differently than virtually all other career federal employees, Congress unconstitutionally discriminated against judges.

In light of the *Hatter* decision, the court of appeals should have granted rehearing to address the only question that needs to be resolved in order to determine whether Congress' refusal to pay the promised ECI adjustments constituted unlawful discrimination in violation of the Compensation Clause, *i.e.*, whether the inclusion of a relatively small number of high ranking officials in the blocking statutes adequately distinguishes this case from *Hatter*. Petitioners respectfully submit that if the *Hatter* decision is to have any real meaning, in terms of the protections afforded under Article III, this question must be answered in the negative.

CONCLUSION

Petitioners respectfully submit that, for all of the above reasons, the petition for certiorari should be granted.

Respectfully submitted,

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No. _____

In The

Supreme Court of the United States

SPENCER WILLIAMS, LOUIS C. BECHTLE, SANDRA S. BECKWITH, WILLIAM MATTHEW BYRNE, JR., ADRIAN G. DUPLANTIER, MORRIS E. LASKER, THOMAS COLLIER PLATT, JR., JOHN W. REYNOLDS, WALTER HERBERT RICE, MARVIN H. SHOOB, JOSEPH L. TAURO, LAUGHLIN E. WATERS, LEE R. WEST AND HENRY RUPERT WILHOIT, JR.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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United States Court of Appeals for the Federal Circuit

99-1572, 00-1254, -1255

SPENCER WILLIAMS, AUBREY E. ROBINSON, JR., C. CLYDE ATKINS, LOUIS C. BECHTLE, SANDRA S. BECKWITH, LUCIUS D. BUNTON, III, WILLIAM M. BYRNE, JR., ADRIAN G. DUPLANTIER, IRVING HILL, MORRIS E. LASKER, THOMAS C. PLATT, JR., JOHN W. REYNOLDS, WALTER H. RICE, MARVIN H. SHOOB, JOSEPH L. TAURO, LAUGHLIN E. WATERS, LEE R. WEST, CHARLES WIGGINS, and HENRY R. WILHOIT, JR.

Plaintiffs-Appellees,

v.

UNITED STATES,

Defendant-Appellant.

DECIDED: February 16, 2001

Before CLEVENGER, *Circuit Judge*, PLAGER, *Senior Circuit Judge*,* and GAJARSA, *Circuit Judge*.

Opinion for the court filed by *Circuit Judge* CLEVENGER.

Dissenting Opinion filed by *Senior Circuit Judge* PLAGER.

CLEVENGER, *Circuit Judge*.

The United States appeals from the decision of the United States District Court for the District of Columbia holding that Plaintiffs Spencer Williams, *et al.* ("the

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* Judge Plager assumed senior status on November 30, 2000.

Judges") are entitled to back pay and future cost-of-living pay increases under the Ethics Reform Act of 1989. *See Williams v. United States*, 48 F. Supp. 2d. 52, 65 (1999). In the four years involved in this case, Congress enacted legislation providing cost-of-living pay increases for federal employees, including federal judges, with the increases payable the following January 1. But in each of those years, Congress also enacted specific legislation, before the end of the year, which denied such pay increases to federal judges, while allowing the increase to be paid to other federal employees. Ruling in favor of Plaintiffs, the district court held that the statutes which denied the pay increases to federal judges violate section 1 of Article III of the United States Constitution, a provision that bars Congress from diminishing the compensation of federal judges. Because clear and unavoidable precedent from the Supreme Court permits Congress to block planned increases in the compensation of federal judges, so long as the blocking statutes are enacted before the planned increases become due and payable to federal judges, the district court erred. We reverse the judgment of the district court, and remand the case with instructions to enter judgment in favor of the United States.

I

In 1989, the Ethics Reform Act, Pub. L. No. 101-194, 103 Stat. 1716 ("the 1989 Act"), put in place a system by which federal judges, under certain circumstances, were to obtain, beginning in 1991, yearly cost-of-living pay increases ("COLAs"). The COLA provisions of the 1989 Act were but one part of a host of important reforms. Key reforms of the 1989 Act included extension of post-

employment "revolving door" restrictions to the legislative and executive branches, a ban on receipt of honoraria by all federal employees (except members of the Senate), limitation on the outside income for employees in all three branches to avoid any appearance of unethical behavior, increased financial disclosure by federal employees, limitations on gifts and travel, creation of conflict-of-interest rules for legislative branch staff, and, of course, important adjustments to compensation for all three branches. Federal judges received significant increases in base pay, to make up for the adverse effect of inflation on previous levels of base pay and to catch up for COLAs previously withheld from the federal judges by Congress. *See* Statement by President of the United States Upon Signing of H.R. 3660, 1989 U.S.C.C.A.N. 1225 (synopsizing key features of the 1989 Act).

Pursuant to the 1989 Act, once a determination was made by Congress in a given year that a COLA would be paid to federal employees on the General Schedule, a COLA became payable to federal judges. *See* 28 U.S.C. § 461 (1994) (adjusting judicial pay "[e]ffective at the beginning of the first applicable pay period commencing on or after the first day of the month in which an adjustment takes effect under section 5303 of title 5 in the rates of pay under the General Schedule"). The increases would take effect – that is, they would be payable – starting on the first day of the following calendar year. *See id.*; 5 U.S.C. § 5303(a) (1994) (increases are "[e]ffective as of the first day of the first applicable pay period beginning on or after January 1 of each calendar year"). This procedure began in 1991. *See* Pub. L. No. 101-194, § 704(b), 103 Stat. 1716, 1769. In January of 1991, 1992 and

1993, federal judges received COLAs. For 1994, Congress awarded no COLA to the General Schedule, and consequently none became payable to federal judges on January 1 of that year.

For 1995, 1996, 1997, and 1999, such automatic COLA pay increases were set to go into effect for General Schedule employees and federal judges, as of the first day of the calendar year. But for those years, to the disappointment of the federal judges, the Congress passed separate laws, and the President signed them into effect, that expressly barred the payment of the COLAs to federal judges. *See* Pub. L. No. 103-329, § 630(a)(2), 108 Stat. 2382, 2424 (1994), Pub. L. No. 104-52, § 633, 109 Stat. 468, 507 (1995), Pub. L. No. 104-208, § 637, 110 Stat. 3009, 3009-364 (1996), Pub. L. No. 105-277, § 621, 112 Stat. 2681, 2681-518 (1998). Each of those "blocking" acts became law before the January 1 effective date of the COLA pay increases.

The Judges responded by bringing this class action lawsuit in the United States District Court for the District of Columbia. Their suit alleges that the deprivation of the pay increases, as a result of Congress' blocking acts, violates Article III of the United States Constitution. Article III, of course, protects judicial compensation: "The Judges . . . shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. Const., art. III, § 1. The history of this provision, and its significance to the functioning of an independent federal judiciary, has been recounted eloquently and at length elsewhere, and need not be repeated here. *See, e.g., Evans v. Gore*, 253 U.S. 245, 249-54 (1920); *United States v. Will*, 449 U.S. 200, 217-21 (1980).

The theory of the Judges' suit is that Congress "diminished" judicial compensation by specifically denying federal judges the COLA raises that would have been paid under the statutory scheme of the 1989 Act, but for the acts of Congress that nullified the otherwise automatic increases. The asserted logic of this theory is that the judicial COLA increases became vested – that is, the Judges became entitled to them for later dates of receipt – before the dates that Congress acted to block them. The Judges thus allege that the laws depriving them of the COLAs are void as unconstitutional under Article III, section 1, and that they are therefore entitled to the COLAs, in the form of back pay and a current increase in salary. The Judges also request a declaration that the COLA provisions of the 1989 Act must be followed in future years.

The district court, on cross-motions for summary judgment, held in favor of the Judges, ruling that "[t]he Ethics Reform Act granted federal judges a COLA . . . adjustment, effective at the time of the enactment of the Act in 1989." *See Williams*, 48 F. Supp. 2d at 59. Because it considered the COLAs to have become "part of the compensation due and payable to Article III judges," *id.* at 59 (citation omitted), on the date that the 1989 Act became law, the district court granted monetary judgment in favor of the Judges and ordered the government to award COLAs to federal judges in the future whenever COLAs are awarded to the General Schedule. *See id.* at 65. Thus, under the district court's order, whenever Congress in the future awards a COLA to the General Schedule, Article III requires that a COLA be paid to federal judges.

The government then brought these appeals,[1] over which we have jurisdiction pursuant to 28 U.S.C. § 1295(a)(2) (1994).

II

Before turning to the merits of the case, we address the preliminary issues of jurisdiction over this appeal and our potential disqualification.

A

The Judges invoked the jurisdiction of the district court under 28 U.S.C. § 1346(a)(2) (1994). That provision, commonly known as the Little Tucker Act, vests the district court with jurisdiction over a "claim against the United States, not exceeding $10,000 in amount." In its brief to this court, the government suggests that the individual plaintiff judges would each receive in excess of $10,000 were we to affirm the judgment of the district court. At oral argument, the government withdrew its jurisdictional challenge at least as to the Judges' prayer for relief for the 1995 year, since each individual judge would receive less than $10,000 for the unpaid COLA for that year. We agree that the district court possessed Little Tucker Act jurisdiction at least to that extent, if not to the entirety of the complaint. *See Hatter v. United States*, 953

[1] We have consolidated the three appeals before us. No. 99-1572 concerns the 1995, 1996, and 1997 years, No. 00-1255 deals with 1999, and No. 00-1254 concerns prejudgment interest. The disposition of the appeal in No. 99-1572 moots the other appeals.

F.2d 626, 628-29 (Fed. Cir. 1992). Because sufficient jurisdiction is established in the district court to authorize its ruling as to 1995, and because we hold that the Judges' case fails, we need not decide the full extent of the district court's jurisdiction over the Judges' complaint.[2]

B

We now turn to the question of our potential disqualification. Under 28 U.S.C. § 455(b)(4) (1994), "[a]ny justice, judge, or magistrate of the United States" is disqualified if he or she "has a financial interest in the subject matter in controversy." Given that the remedies ordered by the district court would both result in damages awards to federal judges serving during the relevant years, as well as require future COLAs to be granted according to the 1989 Act, it appears that every Article III judge has a potentially-disqualifying financial interest in the outcome of this case. *See, e.g., Will*, 449 U.S. 200, 212 (1980) (noting, in a factually similar case, that "all Article III judges have an interest in the outcome").

Section 455, however, does not alter the centuries-old "Rule of Necessity," which allows – and even seems to require – federal judges to hear and decide matters in which they have a financial interest, if necessary to the exercise of the court's jurisdiction. *See Will*, 449 U.S. at 214 ("The true rule unquestionably is that wherever it becomes necessary for a judge to sit even when he has an interest – where no provision is made for calling another

[2] If necessary, however, we adopt the jurisdictional analysis set out in the dissenting opinion.

in, or where no one else can take his place – it is his duty to hear and decide, however disagreeable it may be." (quoting *Philadelphia v. Fox*, 64 Pa. 169, 185 (1870)). Accordingly, the Supreme Court has held that where Article III judicial compensation is at issue, judges have an "absolute duty . . . to hear and decide cases within their jurisdiction." *Will*, 449 U.S. at 215. We thus must accept the obligation to hear this appeal, pursuant to the Rule of Necessity, notwithstanding our personal interest in the outcome.

III

In the district court, the government argued, as it does again here, that the courts have no occasion to worry over the constitutional implications of the refusal by Congress to allow the otherwise automatic COLAs to take effect in 1995, 1996, 1997 and 1999, as stated in the 1989 Act. This is so, according to the government, because of the requirements of Section 140 of a Joint Resolution making continuing appropriations for fiscal year 1982. *See* Pub. L. No. 97-92, § 140, 95 Stat. 1183, 1200 (1982). Section 140 states in relevant part:

> Notwithstanding any other provision of law or of this joint resolution, none of the funds appropriated by this joint resolution or by any other Act shall be obligated or expended to increase, after the date of enactment of this resolution, any salary of any Federal judge or Justice of the Supreme Court, except as may be specifically authorized by Act of Congress hereafter enacted . . .

The government argues that in the years at issue here, the COLAs sought by the judges were not "specifically authorized" by Congress, and thus Section 140 prevents their payment. We disagree.

First, we note that by its own terms, the relevant provisions of Public Law 97-92, which contained Section 140, expired as of September 30, 1982. *See* Pub. L. No. 97-161, 96 Stat. 22 (1982) (extending life of provisions from March 31, 1982 to September 30, 1982); Pub. L. No. 97-92, § 102(c), 95 Stat. 1183 (1981). The government, however, notes that in the years 1991, 1992, 1993, and 1998, when federal judges were granted COLAs under the provisions of the 1989 Act, Congress passed laws stating that "[p]ursuant to section 140 of Public Law 97-92, Justices and judges of the United States are authorized during [1991, 1992, 1993] to receive a salary adjustment in accordance with 28 U.S.C. section 461." Pub. L. No. 101-520, § 321, 104 Stat. 2254, 2285 (1990); Pub. L. No. 102-140, 105 Stat. 782, 810 (1991); Pub. L. No. 102-395, 106 Stat. 1828, 1959 (1992). Thus, the government argues that Congress clearly intended Section 140 to have a life beyond that of its stated expiration in 1982. We find this response unpersuasive. The recent congressional references to Section 140 are insufficient to convey a congressional intent to override the unmistakable language of Public Law 97-92 (as amended by Public Law 97-161) terminating the effect of Section 140 in 1982. Indeed, the enactment of Public Law 97-161 itself supports this view: Congress clearly understood that Section 140 (among other provisions, of course) was scheduled for expiration on March 31, 1982, and duly extended the life of that provision for six months, to September 30, 1982. *See* Pub.

L. No. 97-161, 96 Stat. 22 (Mar. 31, 1982). If Congress had intended to further extend the effective life of Section 140 – that is, beyond the already-extended termination date of September 30, 1982 – it would have done so clearly and deliberately. Instead, the recent references to Section 140 appear to be a congressional response to the views of the Comptroller General of the United States, who in a series of letters and decisions since 1982, has taken the position that Section 140 is permanent legislation. *See Federal Judges V*, 1996 WL 97482 (Mar. 6, 1996) (unpublished); *Federal Judges IV*, 65 Comp. Gen. 352 (Feb. 27, 1986); *Federal Judges III*, 63 Comp. Gen. 141 (Dec. 28, 1983); *Federal Judges II*, 62 Comp. Gen. 358 (May 6, 1983); *Federal Judges I*, 62 Comp. Gen. 54 (Nov. 23, 1982); Letter from Comptroller General of the United States to The Honorable Jamie L. Whitten, October 1, 1982. We view these citations to Section 140 as pragmatic steps taken by Congress to set aside any possible legal arguments (based on Section 140) that the recent COLAs and other pay adjustments are rendered void by Section 140. Where Congress enacts legislation with a clear and express termination date, we need more than the views of the Comptroller General to rewrite the plain language of a statute. *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) ("As in any case of statutory construction, our analysis begins with the language of the statute. And where the statutory language provides a clear answer, it ends there as well.") (internal quotations and citations omitted). Congress failed to mark Section 140 with the indicia of permanence. The effectiveness of Section 140 therefore ended on September 30, 1982.

Second, even if Section 140 did not expire as of September 30, 1982, the 1989 Act falls well within the specific exception in that statute for an "Act of Congress hereafter enacted." That is, Section 140, by its own terms, yields to inconsistent provisions of later-enacted laws. Here, clearly, the 1989 Act was enacted after Section 140, and the 1989 Act, by providing a specific process by which federal judges are to become eligible for COLAs, is inconsistent with the general ban on pay increases established by Section 140. Thus, should there be any disagreement that Section 140 died according to its terms, the 1989 Act controls, rendering the government's reliance on Section 140 moot. In sum, we are wholly unpersuaded by the government's argument that Section 140 is dispositive of the issues presented here. Because Section 140 terminated in 1982 and was clearly superseded by the provisions of the 1989 Act, we must address the question of whether the acts of Congress that repealed the planned COLAs worked violations of Article III.

While we think enough has been said above to dispose of the Section 140 issue, we do agree with and adopt the additional points made by the dissent in support of our unanimous conclusion that Section 140 is inapplicable.

IV

In *United States v. Will, supra*, the Supreme Court considered the Article III implications of negating a judicial pay-raise scheme strikingly similar to the one we address today. The interlocking statutory system considered in *Will* subjected judicial salaries to the same annual

adjustment process made for federal employees under the General Schedule ("GS") pursuant to the Federal Pay Comparability Act of 1970. *See id.* at 203-04. Under the Comparability Act, the President was required to designate an agent each year to submit recommendations deemed appropriate to bring federal employees' salaries in line with prevailing rates in the private sector. *See id.* at 203. The President also retained the authority to submit his own recommendation. *See id.* at 204. Which recommendation controlled depended upon Congress: if one House of Congress adopted a resolution expressing disapproval of the President's adjustments within 30 days of their submission, then the agent's recommendation would control. *See id.* Judicial salaries were automatically increased, either by the amount specified by the agent or by the amount recommended by the President. *See id.* at 203. The effective date of the pay increases was to be the start of the first pay period beginning on or after the beginning of the federal fiscal year on October 1. *See id.* at 204. Thus, the statutory pay adjustment scheme in *Will* provided for "automatic" pay raises to the GS and to federal judges: once the amount of the COLA was fixed according to the Comparability Act processes, GS employees and federal judges, pursuant to statute, would receive COLA pay increases, beginning on October 1. *See id.* Pursuant to the Comparability Act, in every ensuing year GS employees and federal judges were to receive COLAs. No further legislative act was required to guarantee receipt of the COLA. Only the amount of the COLA might have been affected by a legislative resolution. Federal judges were linked into the Comparability Act, and

thus assured annual COLAs, by the terms of the Executive Salary Cost-of-Living Adjustment Act of 1975, Pub. L. 94-82, 89 Stat. 419. The statute, in section 205, expressly provided that federal judges would receive the annual COLA adjustment given to the General Schedule. The Senate Report on that statute, S. Rep. No. 94-333 (July 29, 1975) is replete with references to the need for increase in judicial compensation, comparing the level of such compensation to the greater incomes of private attorneys, *id.* at 6, and comparing the compensation of federal judges unfavorably to that of state court judges. *Id.* The report also noted that federal judges were leaving the bench to return to more lucrative private life, *id.* at 8, and cited the "critical need" to adjust judicial salaries. *Id.* at 13.

The COLA statute considered in *Will* guaranteed that federal judges would receive – every year – a COLA pay increase. The statute authorizing the COLAs for federal judges contained no mechanism whereby Congress could prevent the automatic COLAs from taking effect every year. Nonetheless, in four particular years at issue in *Will*, Congress passed specific legislation that barred payment of the COLAs to federal judges. The question before the Court in *Will* was whether Congress has the constitutional authority to block automatic COLAs that would increase judicial compensation.

The question for us is no different than the question which the Supreme Court posed for itself to initiate the deliberative process in *Will* that led to the constitutional rule of vesting that the Court adopted. The question bears repeating here, to remind us of the necessary focus of our attention:

> [W]hen, if ever, does the Compensation Clause prohibit the Congress from repealing salary increases that otherwise take effect automatically pursuant to a formula previously enacted? We must decide when a salary increase authorized under such a formula "vests" – *i.e.*, becomes irreversible under the Compensation Clause. Is the protection of the Clause first invoked when the formula is enacted or when increases *take effect*?

Id. at 221 (emphasis in original).

In *Will*, the Supreme Court considered four different years in which the statutory system sought to provide COLAS to federal judges. There can be no doubt that the statutory scheme considered in *Will* was designed by Congress to provide *automatic* annual COLA pay increases to the GS and to federal judges. In the first year ("Year 1"), the rate of increase under the Comparability Act was set at 4.8 percent. *See id.* at 205-06. Under the terms of the Comparability Act, no legislative act was necessary to put the COLA pay increase into effect. Instead the requisite salaries were simply adjusted by Executive Order No. 11941, signed by the President on October 1, 1976. Also on October 1, the first day of the new fiscal year, and the first day of the relevant pay period, the President signed a measure (hereinafter referred to as a "blocking statute"), which purported to block the pay increase for federal judges. *See id.* (quoting Pub. L. No. 94-440, Title II, 90 Stat. 1439 (1977)). The Supreme Court held that this enactment was in violation of Article III, because "the 4.8% increase under the Adjustment Act already had taken effect, since it was operative with the start of the month – and the new fiscal

year – at the beginning of the day." *Id.* at 224-25. Therefore, the attempt to block the pay increase to judges was in fact a repeal of the salary increase already in force as of the beginning of the day, and thus "diminished" the salary of federal judges. *Id.* at 225.

In the second year ("Year 2") considered by the Court in *Will*, the specified rate of pay increase was 7.1 percent. *See id.* at 226. This salary increase became effective by virtue of Executive Order No. 12010, issued by the President on September 28, 1977. In this year, however, the President had previously signed a blocking statute on July 11, well prior to the October 1 effective date of the pay increases. *See id.* at 206. The blocking statute thus prevented federal judges from getting their COLA, even though the statutory scheme provided that the COLA would automatically take effect the following October 1. The Court held that the rescission by Congress of the planned "automatic" pay increase for judges was not a violation of Article III, section 1. *See id.* at 229. The Court reasoned that for purposes of Article III, the pay increase to judges had not yet "vested" when the President and Congress blocked it by statute, stating: "a salary increase 'vests' for the purposes of the Compensation Clause only when it takes effect as part of the compensation due and payable to Article III judges." *Id.* Because the planned pay increase did not actually take effect until October 1, the President and Congress were free to alter or prevent it until that date. *See id.* ("[W]e hold that the Compensation Clause did not prohibit Congress from repealing the planned but not yet effective cost-of-living adjustment of October 1, 1977, when it did so before October 1, the time

it first was scheduled to become part of judges' compensation.").

The third year ("Year 3") was similar to Year 2. The President approved the blocking statute on September 30, 1978, just in time to prohibit the automatic COLA from becoming constitutionally protected judicial compensation. *See id.* Thus, while the GS salaries were increased pursuant to an Executive Order by 5.5 percent, the judges were deprived of their increase. *See id.* at 207. Because the blocking statute took effect before October 1, the Court ruled that no constitutional violation had occurred. *See id.* at 229.

The fourth year ('Year 4") was a reprise of Year 1. The rate of salary increase pursuant to Executive Order was 7 percent, which was a reduced figure submitted by the President (the President's agent had suggested a 10.41 percent increase). *See id.* at 208. Year 4, according to the Supreme Court's statement of the facts in *Will*, was the only year in which the President overrode the agent's suggested COLA. The blocking statute, however, was not signed by the President until October 12, well after the October 1 effective date of the pay increases. *See id.* Accordingly, the Court held that the blocking statute in Year 4 was an unconstitutional diminishment of judicial pay. *See id.* at 230.

In sum, the Supreme Court in *Will* unanimously created a clear and simple rule for determining whether the repeal of a statutorily-mandated judicial pay increase runs afoul of Article III. The analysis turns on the *timing* of the repeal action rather than the "automatic" or "discretionary" nature of the planned pay raise. Pursuant to

Will, if Congress and the President wish to prevent a planned increase in judicial compensation, they must do so before the date that the pay increase becomes actually "due and payable" as part of the judges' compensation package. *See id.* at 229. Legislative blocking action taken after a pay increase has taken effect unconstitutionally diminishes judicial pay.

Why, one may ask, did the Supreme Court graft this vesting rule onto Article III? The Supreme Court gave us the answer in *Will*:

> To say that the Congress could not alter a method of calculating salaries before it was executed [i.e. became due and payable in the manner specified by Congress] would mean the Judicial Branch could command Congress to carry out an announced future intent as to a decision the Constitution vests *exclusively* in the Congress.

Id. at 228 (emphasis added). At the end of the sentence just quoted, the Supreme Court appended footnote 33, stating: "Indeed, it would be particularly ironic if we were to bind Congress to an indexing scheme for salaries when the Framers themselves rejected an indexing proposal." Congress, of course, alone has the constitutional authority to set the compensation of federal judges. In *Will*, the Supreme Court accommodated the dual commands of Article III – that while Congress sets judicial compensation, once vested it cannot diminish that compensation. The vesting rule of *Will* marks the point in time at which a specific congressional decision to increase judicial compensation cannot be reversed.

V

With this understanding of the legal framework established by the Court in *Will*, by which we of course are strictly bound, we now turn to the circumstances of this case.

A

Adjustments to judicial salaries are authorized by 28 U.S.C. § 461 (Supp. 2000), which states:

(a)

(1) Subject to paragraph (2), effective at the beginning of the first applicable pay period commencing on or after the first day of the month in which an adjustment takes effect under section 5303 of title 5 in the rates of pay under the General Schedule (except as provided in subsection (b)), each salary rate which is subject to adjustment under this section shall be adjusted by an amount, rounded to the nearest multiple of $100 (or if midway between multiples of $100, to the next higher multiple of $100) equal to the percentage of such salary rate which corresponds to the most recent percentage change in the ECI (relative to the date described in the next sentence), as determined under section 704(a)(1) of the Ethics Reform Act of 1989. The appropriate date under this sentence is the first day of the fiscal year in which such adjustment in the rates of pay under the General Schedule takes effect.

(2) In no event shall the percentage adjustment taking effect under paragraph (1) in any calendar year (before rounding), in any salary rate, exceed the percentage adjustment taking effect in such calendar year under section 5303 of title 5 in the rates of pay under the General Schedule.

(b) Subsection (a) shall not apply to the extent it would reduce the salary of any individual whose compensation may not, under section 1 of article III of the Constitution of the United States, be diminished during such individual's continuance in office.

Section 461 thus provides two important guideposts. First, of course, it links judicial pay raises with adjustments to GS salaries. But even more importantly, it explicitly establishes the date that such raises take effect: any pay increases are to be "effective at the beginning of the first applicable pay period commencing on or after the first day of the month in which an adjustment takes effect under section 5303 of title 5 in the rates of pay under the General Schedule." 28 U.S.C. § 461(a)(1). Section 5303 of Title 5 provides that GS salary adjustments take effect as of "the first day of the first applicable pay period beginning on or after January 1 of [the] calendar year." Thus, section 461, incorporating the relevant language from section 5303, provides that any judicial pay increases will take effect as of the first applicable pay period beginning after January 1. Under the Supreme Court's decision in *Will*, this date is the critical date: before this date, Congress and the President may act to block planned pay increases, *see* 449 U.S. at 226-29 (discussing Years 2 and 3); after this date, a statute repealing

a judicial pay increase is unconstitutional, *see* 449 U.S. at 224-26, 229-30 (discussing Years 1 and 4).

In this case, there is no dispute that in the years at issue (1995, 1996, 1997, and 1999), GS salaries were increased. There is also no dispute that, given the GS salary adjustments and the framework established by the 1989 Act, judicial salaries should also have been increased, effective as of the first applicable pay period on or after January 1 of the next calendar year. Indeed, the whole of the 1989 Act, and its legislative history, indicate that Congress wanted to create an automatic, irreversible, COLA-granting mechanism for federal judges, contingent only upon the grant of a COLA to the General Schedule. The 1989 Act thus expresses a promise the 1989 Congress made to itself and to federal judges, and a wish it made to future Congresses, to provide federal judges with future pay increases. But in 1995, 1996, 1997, and 1999, different Congresses rejected the wish expressed in the 1989 Act, and acted to block the judicial pay increases, as follows:

- The pay increase that was to take effect on January 1, 1995 was blocked by Section 630(a)(2) of Pub. L. 103-329, 108 Stat. 2382, 2424 (1994), which provided that "[f]or the purposes of each provision of law amended by section 704(a)(2) of the Ethics Reform Act of 1989 (5 U.S.C. 5318 note), no adjustment under section 5303 of title 5, United States Code, shall be considered to have taken effect in fiscal year 1995 in the rates of basic pay for the statutory pay systems." This law was signed by the President on September 30, 1994.

- The pay increase that was to take effect on January 1, 1996 was blocked by Section 633 of Pub. L. 104-52, 109 Stat. 468, 507 (1995), using similar language. This law was signed by the President on November 11, 1995.

- The pay increase that was to take effect on January 1, 1997 was blocked by Section 637 of Pub. L. 104-208, 110 Stat. 3009, 3009-364 (1996), using similar language. This law was signed by the President on September 30, 1996.

- The pay increase that was to take effect on January 1, 1999 was blocked by Section 621 of Pub. L. 105-277, 112 Stat. 2681, 2681-518 (1998), using similar language. This law was signed by the President on October 21, 1998.

Obviously, each of these unambiguous laws – which neither party denies had the intended effect of preventing the planned judicial pay increase for each of the years in question – was passed by Congress and approved by the President before the January 1 date that the COLAs were to take effect. Under *Will*, put simply, that is the end of our inquiry, and the Judges' cause must fail. As the Supreme Court's analysis of Years 2 and 3 in *Will* commands, "a salary increase 'vests' for the purposes of the Compensation Clause only when it takes effect as part of the compensation due and payable to Article III judges." 449 U.S. at 229. The statutory scheme at issue in *Will* fixed the effective date of the pay increases as October 1; actions by Congress and the President before that date (Years 2 and 3) were permissible; actions after that date (Years 1 and 4) were not. Here, the only difference in the analysis is that the statutory scheme (28 U.S.C. § 461)

establishes the effective date of the COLAs as January 1. Because, in each of the years at issue in this case, the President signed the blocking law before January 1, these actions do not violate Article III of the United States Constitution.

B

On appeal, the Judges again argue that the COLAs "vested," for Article III purposes on January 1, 1991, the effective date of the 1989 Act. That is, the Judges posit that, as of January 1, 1991, federal judges were due COLAs in every subsequent year, subject only to the condition that COLAs were granted to GS employees. The Judges also note that, as of the passage of the blocking statutes in the years at issue, "all steps to finalize the adjustments had been completed." Appellee's Br., at 43. Thus, according to the Judges, by the time Congress and the President acted, their compensation had already been increased, thus making the blocking statutes a diminishment of judicial pay.

At oral argument, the Judges' position was highlighted by the following hypothetical. Assume that Congress in 2000 enacts and the President signs a bill stating that "annual compensation for all federal judges shall be increased by $50,000 per judge on January 1, 2005." Then, in 2004, another act is passed and signed that flatly repeals the planned $50,000 pay increase. According to the Judges, the 2004 Act is unconstitutional as a diminishment in judicial compensation. According to the Judges, the $50,000 increase must be paid starting in 2005, notwithstanding the 2004 blocking statute.

The Judges' position, as stated in the district court, the briefs here, and at oral argument, evinces a wishful misunderstanding of the Article III "vesting" rule which the Supreme Court established in *Will*. The central holding of *Will* is unambiguous: judicial pay increases which are enacted *and* effective, *except* in the sense that they are not yet "due and payable" to judges, may be repealed. *See* 449 U.S. at 228 ("To say that Congress could not alter a method of calculating salaries before it was executed would mean the Judicial Branch could command Congress to carry out an announced future intent as to a decision the Constitution vests exclusively in the Congress."). In *Will*, the judicial pay raises in Years 2 and 3 were, by statute, due to take effect as of the start of the fiscal year on October 1; no further action was required on the part of Congress to add the COLAs to the compensation of federal judges. There is no difference between years 2 and 3 in *Will* and the years in question in this case: everything necessary for the effectiveness of the pay increases had occurred before the negating legislation, except for the passage of time to permit pay increases to become due and payable to the judges. The automatic COLAS in Years 2 and 3 were fully effective, as matters of legislation: they only awaited a date upon which they could be added to judicial pay checks. Yet the Supreme Court held that the repeal of those pay raises did not violate Article III. *See id.* at 226-29. The reason for this holding is that the Supreme Court established a "vesting" rule for Article III that is exclusively focused on whether the pay adjustments have become "part of the compensation due and payable" to judges. *Id.* at 229.

Typically, "vesting" of future interests only requires two components: an identification of the future owner, and certainty that the property would transfer. *See, e.g.*, 2 Blackstone's Commentaries 168; Simes & Smith, *The Law of Future Interests*, § 65, pp. 54-55 (2nd ed. 1956). In *Will*, the Supreme Court departed from traditional vesting rules to set forth a rule that "vesting," for Article III compensation purposes, in effect requires the *actual possession* of the additional compensation. *See* 449 U.S. at 228-29. That is, under the vesting rule in *Will*, pay increases for Article III judges are left constitutionally unprotected until the judges actually begin to accrue compensation under the increased rates (occurring, of course, at the start of the first pay period when the increased pay is in effect). The Supreme Court in *Will* reasoned that this rule was required because the Constitution, by design, had left increases in judicial pay "exclusively" with the Congress. *Id.* at 228. As the Court noted, "it would be particularly ironic if [courts] were to bind Congress to an indexing scheme for salaries when the Framers themselves rejected an indexing proposal." *Id.* at 228 n.33. Congress, of course, has strong political and practical incentives to provide fair and adequate salaries to Article III judges, including provisions for increases in the cost of living and a reasonable relationship with private sector rates of pay. As the Court in *Will* noted, however, the Framers deliberately left such decisions to the Congress. *See id.* at 220 ("The Convention finally adopted [Gouverneur] Morris' motion to allow increases by the Congress, thereby accepting a limited risk of external influence in order to accommodate the need to raise judges' salaries when times changed.").

The position adopted by the Judges (and accepted by the district court) reduces to the contention that Congress, once it has enacted a law promising a future pay increase to federal judges, may not, as a constitutional principle, amend downwards or abrogate that promise, irrespective of whether the judges have actually begun seeing the effects of the pay increase in their paychecks. While perhaps a sound equitable principle, this supposed rule presented by the Judges is simply contrary to the rule established by the Supreme Court in *Will*. *See, e.g., id.* at 228 ("For Year 2 . . . the [blocking] statute was passed before the Adjustment Act increases had taken effect – before they had become part of the compensation due Article III judges. Thus, the departure from the Adjustment Act policy in no sense diminished the compensation Article III judges were receiving; it refused only to apply a previously enacted formula."). While we can agree with the Judges that the repeated departures from the 1989 Act were perhaps regrettable and ill-considered policy choices, we cannot accept that the Constitution – which as interpreted in *Will* lodges exactly this type of policy decision with the Congress – forbids it. Indeed, the Supreme Court emphasized that such policy choices are within the constitutional power of Congress to set judicial compensation. The 1989 Act was an admirable and important attempt to address the significant pay gap between federal judges and their counterparts in the private sector. But it did *not*, for Article III purposes, "vest" the judges with any pay increases. Thus, so long as the Supreme Court permits the rule of *Will* to survive, any remedy (and responsibility) for the failure of the 1989 Act

to consistently achieve its goals must be supplied by Congress, not by the inferior federal courts.

VI

A

In its opinion below, the district court, aware of *Will's* roadblock, held that the circumstances surrounding the Judges' claims here did not fall within the rules established by the Supreme Court in *Will*. The district court found that the 1989 Act "differs substantially" from the pay-raise system discussed in *Will* in three ways, thereby justifying a different answer to the constitutional question:

(1) First, the district court noted that the 1989 Act "imposes severe limitations on the outside income federal judges may earn, forbids the receipt of honorar[ia] and imposes mandatory work loads on senior judges." *Williams*, 48 F. Supp. 2d. at 57.

(2) Second, the district court noted that the 1989 Act "revised the process for providing annual cost-of-living adjustments for federal judges" by establishing a "trigger" when there is an adjustment to GS salaries, and that "Congress took control and prescribed the means for determining the annual pay adjustment." *Id.*

(3) And third, the district court noted that the 1989 Act set a five percent cap on the amount of any COLA for federal judges. *See id.*

The court's first and third distinctions are irrelevant to the constitutional question before us: the Judges make no claim that the limitations on outside income established by the 1989 Act are violations of Article III – and they make no claim that they are legally entitled to COLAs as a quid pro quo for restrictions on nonjudicial activities. Nor do they suggest that the five percent cap is unconstitutional. To be sure, the Judges' ability to supplement their judicial pay was restricted by the 1989 Act, and notions of equity may suggest that automatic COLAs, when such are awarded to General Schedule employees, should be a trade-off for such restrictions. But the rule of *Will* permits no equitable amelioration of its harsh bite. And as to the second distinction, it is unquestionable that the 1989 Act revised the mechanics by which judicial pay could be increased. As noted above, the 1989 Act was a deliberate attempt by Congress to ensure that federal judicial pay scales kept pace with private sector salaries. But so was the pay-raise scheme the Supreme Court considered in *Will*. That Congress reduced the involvement of the President in COLA adjustments under the 1989 Act is also of no relevance: the Court in *Will* gave no weight to whether the President or Congress provided the impetus to raise judicial salaries. Indeed, in three of the *Will* years, the President played no role, the recommendation of the agent being left untouched: those years are thus virtually identical to the years in question in this case.

The district court clearly erred, in several respects, in its analysis of the statutory system in place during the *Will* years. First, the district court thought that the "President submitted an Alternative Plan every year." *Williams*,

48 F. Supp. 2d at 56. The Supreme Court found that the President overrode the agent's recommendation in only one year, Year 4. *See Will*, 449 U.S. at 205-09. This error is no doubt harmless, but it was just the beginning of the district court's misunderstanding of the way the statutes operated in the *Will* years. The district court was of the view that no final law was in place to adjust salaries in the *Will* years until the President took some additional action. *Williams*, 48 F. Supp. 2d at 56. According to the district court, the President "had until September 30 [in each of the four years] to accept or reject the proposed adjustment." *Id.* Further, the district court thought that until September 30, it was not clear that there would even be an adjustment. *Id.* This is a complete and fundamental error. The Supreme Court's opinion in *Will* expressly states that the President "may submit to Congress before September 1 an alternative plan [to that recommended by the agent] for adjusting federal employees' salaries." 449 U.S. at 204. The Supreme Court further explained that

> the alternative plan [of the President] controls unless within 30 days . . . either House of Congress adopts a resolution disapproving of the President's proposed plan. If one House disapproves, the agent's recommendation governs. The increases [whether under the agent's or the President's plan] take effect with the start of the first pay period starting on or after the beginning of the federal fiscal year on October 1.

Id.

The Supreme Court's view of the facts in *Will*, by which we of course are bound, closely tracks the language of the relevant statutes. Those facts show that the

President had until September 1 to override the agent's proposed COLA, which would become payable the following October 1 unless the President stepped in on time. If the President overrode the agent's recommendation, then either House of Congress had until September 30 to override the President's plan and reinstate the agent's recommended COLA. In either instance, a COLA would be part of the compensation of the General Schedule employees and of the federal judges on the following October 1. The *Will* statutes guaranteed an annual automatic COLA to the General Schedule and to federal judges.

Given the express findings by the Supreme Court of how the statutes operated in the *Will* years, the district court clearly erred in its review of the *Will* facts. As noted above, the COLA increases in the *Will* years were an automatic certainty come the first day of the next fiscal year, unless, of course, one house of Congress enacted express blocking legislation before the first day of the next fiscal year.

Because the correct understanding of how the *Will* statutes operate is so important to the resolution of this case, we pressed the parties at oral argument as to their understanding of those statutes. Both sides agreed that the COLAs under those statutes were automatic, without any need for further congressional enactments. The errors of the district court became apparent at oral argument, with the government relying on those errors to emphasize the similarity of the circumstances in *Will* to the circumstances in this case – and the Judges making no attempt to defend the errors made by the district court in this regard.

If the statutory scheme in this case is substantively no different than the one in *Will*, then there can be no reason to refuse to apply the law stated in *Will* to the facts of this case. We think it is impossible to distinguish the statutory scheme implemented in 1989, for purposes of application of the Article III compensation vesting rule laid down in *Will*.

The analysis in *Will* thus turned on the timing of the enactment of the blocking laws – an activity, of course, requiring the participation of both Congress and the President. We cannot accept the district court's view that the differences between this case and the scheme addressed in *Will* require a distinct Article III analysis. In short, we cannot escape from *Will's* impact on this case on the ground that the 1989 Act laid down a completely different statutory scheme with entitlement to a different Article III vesting rule than the one laid down in *Will*.

B

In addition to its erroneous view that the 1989 Act can be assessed under a vesting rule different from the one stated in *Will*, the district court relied on an 1803 opinion written by the Circuit Court for the District of Columbia, *United States v. More* (CC DC 1803), *writ of error dismissed for want of jurisdiction*, 3 Cranch 159, 2 L.Ed. 397 (1805). In *More*, Congress had enacted and later abolished a system of fees compensating justices of the peace in the District of Columbia (then Article III positions). After Congress abolished the system, More was indicted for continuing to collect the fees. The Circuit Court held that the abolishment of the fee system was an unconstitutional

diminishment of judicial compensation. *See id.* at 161 n.2. In the district court's view, *More* controlled the outcome in this case because the 1989 Act provides that judges will receive COLAs in the future, whenever adjustments were made to GS salaries. *See Williams*, 48 F. Supp. 2d. at 59. Since *More* held that a future pay arrangement is constitutionally protected, it reasoned that the future pay arrangement of the 1989 Act must also be constitutionally protected.

This is a complete misapplication of *More*, and indeed, simply a replay of the same error committed by the district court in the *Will* case. The district court opinion in *Will* held that "on the basis of the More case alone, the only supportable conclusion . . . is that Congress' attempt to eliminate or avoid the [COLA pay increases] is unconstitutional." *Will v. United States*, 478 F. Supp. 621, 627 (N.D. Ill. 1979) The Supreme Court in *Will*, however, reversed the district court on this point, expressly rejecting the notion that *More* is in any way inconsistent with the Article III vesting rule announced in *Will*. The Court noted that, in *More*, the fee system was "already in place" at the time that Congress abolished it. *Will*, 449 U.S. at 228 n.32. Thus, by abolishing the mechanism by which *More* had been paid for his services, Congress had diminished his compensation. *See id.* That is, in *More*, a justice of the peace was paid for his judicial services (his Article III compensation) by receiving a set amount for certain acts performed. That system of compensation is little different from one based on payments for time served, such as being paid per hour, per day, or per year of service. Irrespective of the particular system, formula, or process involved, the protection of Article III is triggered

only when judges actually begin to accrue compensation under the scheme. *See id.* at 228-229. The outcome in *More* is fully consistent with the vesting rule in *Will*.

The district court thus misunderstood the force of *More*, and fundamentally erred in thinking that *More* supported the result reached by the district court on the constitutional question. Indeed, in the light of the fact that the district court in *Will* pegged its decision in favor of federal judges on its reading of *More*, only to be unanimously reversed in that regard by the Supreme Court, the district court's reliance on *More* in this case is no less than surprising. Furthermore, during oral argument in this case, both sides agreed with the Supreme Court's understanding of the facts in *More*: namely that the fee schedule in suit had been in effect ("already in place as part of the justices' compensation" as stated in footnote 32 in *Will*) before it was repealed by Congress. Thus Justice More, before the repealer, had performed services and had been paid for them at the schedule rate. This is no different from a judge being paid by the hour or month, or indeed by the year, and then having Congress reduce the rate of compensation at which the judge had previously been paid. For these reasons, the Supreme Court held that *More* is fully consistent with the proposition that promises of future increases in judicial compensation can be broken, without Article III consequences, if the promise is broken before the increase becomes part of compensation payable to federal judges. *See Will* at 228 n.32.

C

The district court's citation to *Boehner v. Anderson*, 30 F.3d 156, 158 (D.C. Cir. 1994) is no more helpful in support of its answer to the constitutional question in this case. In *Boehner*, the court analyzed whether the 1989 Act, which also applies to Members of Congress, is inconsistent with the 27th Amendment to the United States Constitution, which prohibits laws effecting pay raises to Members of Congress from taking effect until a congressional election has intervened. The *Boehner* court determined that it was not, holding that the phrase "shall take effect" in the 27th Amendment referred to the date that the 1989 Act was enacted, rather than the date that the COLAs for Members of Congress were actually paid. *See* 30 F.3d at 161-62. Thus, because the first pay raise under the 1989 Act was implemented in January 1991, the requirements of the 27th Amendment were satisfied. *Id.*

From the D.C. Circuit's straightforward analysis, the district court and the Judges find a generalizable rule that COLA pay increases "take effect" (*i.e.*, "vest") when the law providing the indexing scheme is *enacted*, not when the pay increases "become due and payable" under the vesting rule established by *Will*. However, the district court and the Judges fail to come to grips with the specific holding of *Will* – that vesting, for federal judges under Article III, occurs only when compensation begins to accrue to the judges, not when a particular adjustment formula is enacted. *Boehner* considered a very different question: when does a "law" increasing the salaries of Members of Congress "take effect"? As the D.C. Circuit noted, there is little question that the 1989 Act was a "law" that "took effect" in 1989; the COLAs themselves,

operating virtually automatically, were not additional laws. *See* 30 F.3d at 162. This simply has no relevance, however, to the question of whether the judicial pay aspects of the 1989 Act could, consistent with Article III, be revised or abrogated by later Acts of Congress. That question, as we have noted above, is answered in the affirmative by the analysis prescribed in *Will*.

VII

The dissenting opinion argues that the Article III vesting rule in *Will* is inapplicable to this case, because the 1989 Act represents a "political bargain" which was "struck by members of the legislative branch and codified in legislation." The particular bargain to be enforced here is the intent to grant COLAs to federal judges, if granted to the General Schedule, so long as the Judges' compensation from nonjudicial activities is restricted by statute. The dissent asserts that the Constitution compels this court to enforce that bargain. The notion that courts must enforce political bargains is the only reason submitted by the dissent for its unwillingness to abide by the rule in *Will*.

The cases cited by the dissent for the proposition that courts should give effect to political compromises struck in final legislation all involve an issue of statutory interpretation. Common to such cases is language such as:

> As with other problems of interpreting the intent of Congress in fashioning various details of this legislative compromise, the wisest course is to adhere closely to what Congress has written.

Rodriguez v. Compass Shipping Co. Ltd., 451 U.S. 596, 617 (1981). Another iteration of the same point colorfully states that:

> Congress has put down its pen, and we can neither rewrite Congress' words nor call it back to "cancel half a line." Our task is to interpret what Congress has said . . . .

Director, Off. of Workers' Compensation Programs v. Rasmussen, 440 U.S. 29, 47 (1979). These cases, in addition to those cited by the dissent, and a host of others, are unremarkable in that they only state the obvious: that when an issue of statutory interpretation is at hand, courts should where possible respect and uphold political compromises struck within the legislature or between the other two branches.

If the obvious axiom is applied to this case, treating it as only a case of statutory interpretation, we can all agree that the intent of Congress in 1975, with the Executive Salary Cost-of-Living Adjustment Act, is absolutely clear and beyond any possible doubt: federal judges were to receive COLAs in the future automatically. And the intent of Congress in 1989 is equally clear and beyond any possible doubt: federal judges were to receive COLAs in the future whenever COLAs were awarded to the General Schedule. Congress in 1989 no doubt fully intended, hoped and promised that federal judges would receive COLAs in the future according to the COLA-granting terms of the 1989 Act. We can further agree that this intent, hope and promise was shared in some political compromise. But we cannot escape the plain fact that the intent of the 1975 Congress was no different: it intended

that federal judges would receive COLAs in every ensuing year, and because the President signed that bill, we can only presume that he went along with the plan for the future embedded in the statutes. We also cannot escape the fact that the 1975 Act, with its firm promise of future pay increases for federal judges, was the result of a hard-fought political bargain, as well described in the dissenting opinion. If the rule of *Will* overwhelms the intent and political compromises of the 1975 Congress, as it surely does, then we fail to understand why the rule of *Will* does not likewise overwhelm the intent of the 1989 Congress.

The Supreme Court in *Will* could easily have employed the rationale of the dissent in its analysis of the statutes in question, to rule that the bargain struck in the legislative process for future COLAs prohibited the vesting rule that the Court established in *Will*. To that end, the Court could easily have fashioned a vesting rule more consistent with black-letter vesting for future interests, thereby permitting the intent of Congress, as expressed by its legislative processes, to afford constitutional protection, under Article III, for statutorily promised future pay increases for federal judges. For the Court, the "other part" of Article III – the part that reserves to the Congress the sole authority to set judicial pay – stood in the way of traditional vesting rules for future interests. The Supreme Court found the explanation in terms of constitutional law or policy for its vesting rule in the Constitution itself. The Court thus expressed its reasons for rejecting the vesting of future COLAs for federal judges as garden-variety future interests, from a date of statutory enactment, as urged by the dissent.

The reason for the dissent's vesting rule, and the only ground on which it finds any difference between the 1975 and the 1989 Acts, is that the 1989 Act included restrictions, for ethical reasons, on the sources of nonjudicial compensation for federal judges. Indeed, the dissent posits a conditional vesting rule: so long as the limits on nonjudicial compensation exist, future COLAs are vested from the date of enactment of the 1989 Act. If those limits did not exist, presumably the vesting rule of *Will* would apply.

As a first matter, it is clear that Congress has the power to limit the nonjudicial activities of federal judges, even if such limitations reduce nonjudicial compensation. The Judges do not suggest that the protection in Article III for judicial compensation extends to protection of sources of nonjudicial compensation. They do not argue that "taking away" sources of nonjudicial compensation diminishes judicial compensation under Article III. It has to be clear that Congress can deny things of value to federal judges without being obligated by the Constitution to remunerate federal judges in return, as in the *quid pro quo* notion that permeates the rationale of the dissent. The fact that Congress restricted the sources of outside pay for federal judges in the 1989 Act is therefore irrelevant to the question of whether a later Congress, consist [sic] with *Will*, can refuse to deliver a COLA promised by the 1989 Act. Indeed, for those federal judges never having sought compensation for nonjudicial activities, there is no legislative "bargain" as posited by the dissent, pursuant to which they could claim constitutional entitlement to a promised future COLA. Only those judges who were counting on future outside nonjudicial compensation

could claim themselves as third party beneficiaries of the legislative bargain to which the dissent points. We therefore reject the dissent's conditional vesting rule: we do not think that Article III is switched on and off depending on whether in a given year Congress has enacted constitutional legislation that adversely affects some aspect of nonjudicial behavior of federal judges.

We need not quibble with the dissent's view that courts frequently recognize that federal statutes often, if not always, reflect political bargains, ones hard fought-for and frequently difficult to achieve. We can also accept, for purposes of argument, that the 1989 Act contains some form of pact between "members of the legislative branch," even though that fact hardly distinguishes the 1989 Act from any other legislation. Courts, we can presume, ought to be loath to interfere with political bargains, unless some rule of law requires a court to upset the political bargain struck in a statute. Indeed, separation of powers is all about appropriate respect by the judiciary for compromises and bargains struck in the enactment of legislation. Nonetheless, courts must apply the rule of law, even when the rule of law disrupts some perceived legislative compromise. Anytime a court interprets a federal statute in a way contrary to a significant articulate volume of legislative history, or a way that produces outcry from Congress or the President, that court disrupts the political balance that underlay the statute. And when a court is called upon to strike down a federal statute as inconsistent with the Constitution, of course the political deal that produced the statute is frustrated. In the end, the dissent posits a rule of statutory construction with which we disagree: that when a

conditional political bargain is struck involving the compensation of federal judges, the political compromise must be enforced by the courts, as a matter of constitutional law, so long as the bargain remains in place. The dissent's rule, however, completely overlooks the vesting rule in *Will*. That vesting rule, according to the dissent, simply has no room for application so long as the political bargain remains in place.

In the final analysis, the brightest line of distinction between the dissent's view of this case and ours is that the dissent apparently sees the rule in *Will* as one of limited application, a rule that applies only when Congress has not struck some political bargain where judicial compensation is involved. For the dissent, both *Will* and this case are ordinary cases raising only questions of statutory interpretation. The dissent attributes to the *Will* Congress an intent to prohibit future COLAs if blocked by Congress before the due and payable date. We think *Will* cannot bear such a reading. To decide the case, the Supreme Court's opinion in *Will* did not explore the intentions of Congress; instead it explored the constitutional limitations on Congress when it seeks to abrogate a future pay raise for federal judges. This case also does not call upon us to discover the intent of Congress: we can agree that the 1989 Congress, like the 1975 Congress, sought to provide future COLAs to federal judges, even to those judges who did not view themselves as having to "give something up" to get the future COLA. Rather than ask a question of statutory interpretation, this case asks if a later Congress can break a future pay increase promise made by the 1989 Act. The later Congresses that broke the promise of the 1989 Congress did so in statutes that need

no elaborate statutory interpretation. The blocking statutes mean what they say, and their plain meaning requires no resort to legislative history to discover the political bargain or compromise that led to their enactment.

This case and *Will* are thus not cases decided by ordinary canons of statutory interpretation. The rule in *Will* is one of general application: until such a time as a future pay raise for federal judges becomes due and payable, according to the test laid down by the Supreme Court, Congress retains constitutional authority to set the compensation of federal judges, even if the exercise of that authority involves the repeal of previously enacted laws that would produce compensation increases at specific future dates. Ordinary canons of statutory construction, designed for application to reveal the intent of Congress, cannot nullify a rule of constitutional law. *Will* stands at the intersection of congressional authority to set the compensation of federal judges and the provision of Article III that bars Congress from diminishing judicial compensation. It is not the Judges alone who have something at stake in this case. The Congress has at stake its constitutional authority to set the compensation of federal judges. *Will* has told us when Congress can, and when it cannot, defeat the expectations of federal judges to pay increases that are promised by laws which, when first enacted, are intended to guarantee future pay increases to the federal judiciary. In simple and correct terms: until a future pay increase for federal judges becomes due and payable to federal judges and therefore vests in their favor according to the rule in *Will*, it is not protected by Article III. The ground offered by the dissent

to avoid the vesting rule of *Will* must be respectfully declined.

CONCLUSION

It is, of course, profoundly disappointing to the Judges that the arrangement for future federal judicial pay increases worked out by the 1989 Congress has enjoyed such an inconsistent life. While we agree with the Judges' view that the continued strength of the federal judiciary depends in part upon a deliberate, consistent, and fair approach to routine cost-of-living salary adjustments, we cannot, consistent with established Article III principles, hold that the Constitution requires the Judges to prevail in this case. The Supreme Court has drawn a clear line between rescissions of planned-but-not-yet-effective pay increases, and reductions of compensation due and payable to Article III judges. In this case, the laws that prevented the 1995, 1996, 1997 and 1999 COLAs from taking effect fall on the former side of the line. Accordingly, we must hold that the blocking statutes were permissible, if regrettable, constitutional exercises of congressional power. The district court's judgment to the contrary cannot stand. The judgment of the district court is reversed, and the case is remanded to the district court with instructions to enter judgment in favor of the United States.

REVERSED AND REMANDED

United States Court of Appeals for the Federal Circuit

99-1572, 00-1254,-1255

SPENCER WILLIAMS, AUBREY E. ROBINSON, JR., C. CLYDE ATKINS, LOUIS C. BECHTLE, SANDRA S. BECKWITH, LUCIUS D. BUNTON, III, WILLIAM M. BYRNE, JR., ADRIAN G. DUPLANTIER, IRVING HILL, MORRIS E. LASKER, THOMAS C. PLATT, JR., JOHN W. REYNOLDS, WALTER H. RICE, MARVIN H. SHOOB, JOSEPH L. TAURO, LAUGHLIN E. WATERS, LEE R. WEST, CHARLES WIGGINS and HENRY R. WILHOIT, JR.,

Plaintiffs-Appellees,

v.

UNITED STATES,

Defendant-Appellant.

PLAGER, *Senior Circuit Judge*,* dissenting.

I respectfully dissent.

It is wrong to conclude, as my colleagues do, that the Supreme Court's decision in *United States v. Will*, 449 U.S. 200 (hereafter "*Will*"), construing a 1975 Act of Congress, compels us to deny the legislatively decreed COLAs under the 1989 Ethics Reform Act.

It is wrong because it attributes to the Supreme Court a misconstruction of the Constitution that the Court's opinion in *Will* neither supports nor deserves, and it

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* Judge Plager assumed senior status on November 30, 2000.

violates the Supreme Court's established canon of constitutional litigation that avoids the making of constitutional rules when statutory interpretation will suffice.

It is wrong because it refuses to acknowledge the purpose[1] and intent behind Congress's enactment in 1989 of the Ethics Reform Act, a purpose and intent understood and agreed to by both Congress and the President. And it flies in the face of the Supreme Court's stated policy of honoring legislative compromises when the nature and purpose of the compromise is an established part of the public record.

It is wrong because it does a disservice to the judiciary by denying to it the unique protection against arbitrary action accorded to the judiciary for 200 years by the Compensation Clause of Article III, § 1 of the United States Constitution.[2]

I would affirm the judgment of the district court in favor of the plaintiff judges.

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[1] Legislative "purpose" as I use it here is not what sometimes is presented as judicial discovery of an unspoken singular purpose behind a piece of legislation, and used as a hook on which to base an interpretation at odds with the language of the statute. It is used here in the sense of recognizing a fully documented political compromise among legislators that produced the statute in the form in which it was enacted.

[2] "The Judges . . . shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." Art. III, § 1 (odd capitalization in original).

* * *

I begin with an introduction and overview of the case for affirmance, *infra* pp. 4-11. Next, in Part I of the opinion, I address the central issue: was the consequence of Congress's purpose and intent behind the enactment in 1989 of the Ethics Reform Act to commit as a matter of law the COLAs provided in that Act, so that the right to the COLAs "took effect" and were "due and payable" when the Ethics Reform Act became law, subject only to the trigger event, the payment of COLAs to the General Schedule employees? For the reasons I shall explain, the correct answer is yes.

In subpart A of Part I, *infra* pp. 11-16, I explain the background and give the history of Congress's efforts to solve the political conundrum presented to Congress by the Constitution's assigning to that body the duty to set its own salaries, as well as the salaries of senior government officials in the other two Branches. In subpart B, *infra* pp. 16-29, I examine Congress's effort that culminated in the 1975 Adjustment Act, and the Supreme Court's 1980 decision construing that act, *United States v. Will*. In subpart C of Part I, *infra* pp. 29-36, I examine in like manner the effort by Congress that culminated in the 1989 Ethics Reform Act, and demonstrate the differences between those two efforts and why the decision in *Will* does not dictate our understanding of the latter.

On pp. 36-41, *infra*, I summarize, and recapitulate why the correct answer to the central issue requires that we affirm the district court. The reader with limited time who wishes to grasp the kernel of my disagreement with the majority can do so by reading the material on pp. 4-11

(the introduction and overview), and the summary and recapitulation of the case for affirmance, on pp. 36-41.

My profound disagreement with my colleagues on the central merits of the case does not preclude me from joining the majority opinion with regard to several peripheral issues. For one, I agree with the unavoidability of having the court decide the case under the Rule of Necessity.

I also agree with the majority that the trial court had jurisdiction over the cause, though I find it necessary to address more fully than they the question of the district court's jurisdiction. I find their analysis rather thin; it went only far enough to legitimate their reversal of that court's judgment in the lead case. As I would uphold the district court's judgment with regard to all matters on appeal, I must demonstrate that the court had jurisdiction over all the claims. I do so in Part II of this opinion, *infra* pp. 42-46.

I further join the conclusion reached in the majority opinion that Section 140 does not stand as a bar to the claim of the judges. However, given the history of Section 140, the Comptroller General's repeated insistence that it applies to any COLAs to which judges might otherwise be entitled, and the adherence by subsequent Congresses to the Comptroller General's advice, I believe the issue needs a more thorough exegesis than it receives in the majority opinion in order to be fully persuasive. That is Part III of this opinion, infra pp. 46-54.

* * *

I begin with an introduction and overview of the case. The essential difference between my view of this case and that of my colleagues is that, in my view, the Supreme Court in its *Will* decision did not create an immutable, constitutional principle that denies to Congress the power to adopt legislation that it wishes, legislation designed to once again address the thorny problem of government salaries. The majority reads into the 1980 Supreme Court opinion such an immutable principle, the consequence of which is that Congress cannot choose to adopt legislation that differs from the 1975 Act construed in *Will*; even if Congress did, according to the majority this court cannot apply traditional statutory interpretation tools to enforce such legislation. I do not find in the *Will* opinion any such exercise by the Supreme Court, ascribed to it by the majority, of such an extraordinary constitutional construction. On the contrary, I read the *Will* case as a classic exercise of statutory interpretation by the Court, based on the facts of the case in light of the particular statute before it.

Furthermore, I conclude that the interpretive rule the Supreme Court utilized in *Will*, taken on its terms as a rule of statutory construction, when applied to the statute on which these plaintiffs base their claim, results in an outcome different from that in *Will*. This means that the 1989 Ethics Reform Act must be different from the 1975 Adjustment Act, the act construed in *Will*, in ways that are legally determinative.

Asked in standard statutory interpretation terms, is there persuasive evidence that the 1989 Act, as Congress intended it, operates differently, with different effect, from the 1975 Act? The Government argues that there is

insufficient evidence to conclude that Congress intended in 1989 to presently vest any rights to future pay adjustments. Any such adjustments must depend on the will of Congress in any given year. The Government argues that the 1989 Ethics Reform Act is no different legally than the 1975 Adjustment Act, which the Supreme Court in the *Will* case interpreted as not creating any rights to future benefits, at least not until the benefits became part of the judges' salaries in any given year.

The plaintiff judges, as did the district court, reject the analogy to the 1975 Act, arguing that the 1989 Act is different in critical respects. The plaintiff judges further argue that the 1989 Act was intended by Congress to grant protectable rights, rights that could not be ignored by later Congresses, and that *Will* does not control the outcome here.

The Government's position finds support in that there is no express language in the 1989 Act to which the judges can point that clearly states Congress's intention to grant the judges protectable rights. At the same time, the judges' position finds support in that, in important respects, the 1989 Act is different from the 1975 Act.

This then is one of those cases in which Congressional intent cannot be determined directly from the plain language of the statute. Though the plain language of a statute often answers issues regarding scope and function, the question we must answer finds no guidance in the specific language Congress used. It is the purpose and structure of the 1989 Act, especially as compared to the 1975 Act, to which we must look and which must be

examined in some detail in order to ascertain what Congress intended.

Congress, when it enacted the 1989 Ethics Reform Act, clearly had in mind a dual purpose – to remove from itself, from the Executive Branch, and from the Judiciary, the right to earn outside income through particular activities that were considered to have the potential for conflicts of interest, and to replace those sources of income with guaranteed cost-of-living increases whenever standard inflation measures so indicated. I will demonstrate the correctness of that statement by extensive examination of the legislative history of the 1989 Act; also, again by examining its legislative history, I will demonstrate that the 1975 Act, the one construed in *Will*, had no such purpose.

The consequence of this is that both the bar to the prohibited income and the right to the replacement income "took effect" in 1989. So long as the 1989 Ethics Reform Act remains in place, the two are inextricably entwined. "So long as" is important. Consistent with my view, there is no constitutional impediment to Congress, should it so choose in the future, to make yet another effort to solve the problem of salaries for itself and other senior officials. If that effort causes the repeal of the 1989 Act, that carries with it an end to any rights created by the Act. See my discussion of this point *infra*, pp. 39-40.

Again, nothing in *Will* prevents Congress from enacting such dual purpose, linked legislation as it did in 1989. The majority opinion mistakenly treats the rule applied

by the Supreme Court in *Will* as an immutable constitutional construct, somehow dictated by the terms of Article III of the Constitution, and thus universally applicable to all cases that implicate the Compensation Clause of Article III. *See* maj. op. at 12: " . . . the deliberative process in *Will* that led to the *constitutional rule* of vesting that the Court adopted." (emphasis mine). In effect, the majority renders Congress powerless to achieve the purpose that constituted the driving force behind the 1989 Act. *See* maj. op. at 35: "The Supreme Court did not explore the intentions of Congress in the *Will* case; instead it explored the constitutional limitations on Congress. . . . This case also does not call upon us to discover the intent of Congress. . . . Ordinary canons of statutory construction, designed for application to reveal the intent of Congress, cannot nullify a rule of constitutional law."

That is an unfortunate misunderstanding of fundamental legal principles. In the first place, it is a long-standing principle that the Supreme Court does not reach out to decide cases on constitutional grounds when the matter can be resolved on other grounds. *See, e.g., United States v. Wells Fargo Bank*, 485 U.S. 351, 354 (1988) ("[O]ur established practice is to resolve statutory questions at the outset where to do so might obviate the need to consider a constitutional issue."); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring: "The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.").

In *Will*, the Acting Solicitor General, in his brief to the Court, stated the first question presented: "Whether,

as a matter of statutory construction, the [Pay Acts] served to supersede or rescind the cost-of-living increases authorized for Article III judges by the Executive Salary Cost-of-Living Adjustment Act. . . . " Brief for the United States, *United States v. Will*, at 1 (citations omitted). The Court's concern with what the Constitution commanded was to a large extent a response to the argument of the Acting Solicitor General. His argument was that a congressional act could violate Article III only if it constituted a discriminatory attack on the Judiciary. See Brief for the United States in *United States v. Will*, third question presented: "Whether the [Acts at issue] violated the Compensation Clause, where the Acts did not represent a discriminatory attack on Article III judges and were not enacted with the purpose or effect of undermining the independence of Article III judges."[3] The Court answered that question by making it clear that the constitutional protection provided by Article III attached whenever the right to the compensation vested under the governing Act, and was not dependent on some vague notion of discriminatory intent.

There is nothing in the Compensation Clause that mentions "vesting" of rights, nothing to suggest that the

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[3] "MR. GELLER [Acting Solicitor General]: And our position is, as you correctly stated, Justice White, that the correct test, the test that this Court, I think, set forth in O'Malley against Woodrough, is whether the statute is meant to discriminate against Article III judges or to undermine their independence. QUESTION: And you say that if it is not, the Act is constitutional? MR. GELLER: Does not violate the Compensation Clause. . . . " Transcript of oral argument, Oct. 14, 1980, 1980 U.S. TRANS LEXIS 52, at *36.

Constitution dictates an immutable rule. What was involved in *Will* was a question of statutory interpretation. Furthermore, as the majority acknowledges, it is basic property law that rights to property may vest presently even though possession (in this case, of money) is postponed to the future. Indeed, the classic definition of what is called in property law a "future interest" is a vested present right to future possession. I am unwilling to attribute to the Supreme Court the conscious creation of a new and unique "vesting" rule as a constitutional construct, one that is contrary to centuries of common law, and unrelated to any specific language in the Constitution, all without explanation in terms of constitutional law or policy. The obvious explanation for the *Will* rule is the one I have suggested – a matter of statutory interpretation, which is subject to reinterpretation and considered application as a different statute may require.

Indeed, the question here is not what the "vesting" rule should say, but how it should be applied. The language in the *Will* opinion over which the majority trips is that a salary increase vests "only when it takes effect as part of the compensation due and payable to Article III judges," 449 U.S. at 229 (emphasis mine). *See* maj. op. at 15: "Pursuant to *Will*, if Congress and the President wish to prevent a planned increase in judicial compensation, they must do so before the date that the pay increase becomes actually 'due and payable' as part of the judges' compensation package."; *id.* at 20: "[T]he Supreme Court established a 'vesting' rule for Article III that is exclusively focused on whether the pay adjustments have become 'part of the compensation due and payable' to judges."

The majority believes that, because the phrase "due and payable" as applied in *Will* meant that recipients are not entitled to the prescribed COLAs until the COLAs are actually paid, that must necessarily mean that in every case the money must be received before the entitlement accrues. However, as anyone who has ever had to take a bank loan would know, the phrase "due and payable" always asks: due and payable when, and the answer will vary depending on the terms of the particular transaction. In *Will*, the Supreme Court read the 1975 Act to require that the COLA was due and payable when it was in fact received. That may indeed be what the 1975 Act required, but, as I explain more fully below, the evidence is overwhelming that the 1989 Act was designed by Congress to operate in a different manner, and for a different purpose. The majority concedes this point: "[T]he whole of the 1989 Act, and its legislative history, indicate that Congress wanted to create an automatic, irreversible, COLA-granting mechanism for federal judges, contingent only upon the grant of a COLA to the General Schedule." Maj. op. at 18.

The correct interpretation of the 1989 Ethics Reform Act is, as I shall demonstrate, that the COLAs became due and payable contemporaneously with the barring of the right to outside income, that is, in 1989, subject only to the 'trigger' event each year (a condition subsequent, in property law terms) that signaled the need for a cost of living adjustment for federal employees. I refuse to attribute to the 1980 Supreme Court an inability on the part of that Court to anticipate that later Congressional enactments might have different origins and purposes, and might require different understandings. Thus I cannot

agree with the majority that the language of *Will* was intended by the Court to preclude our treating different Congressional acts differently, or, even more oddly, to preclude Congress from writing different legislation.

Finally, I conclude that, once the COLAs provided by the 1989 Act are properly 'triggered' in any given year, Congress may not by a sudden and arbitrary action, at odds with the terms of its own governing legislation, deny the COLAs to which it is committed. Certainly it cannot in the face of the salutary protection accorded to the judiciary by the specific command of Article III, § 1 of the Constitution. To conclude otherwise is to denigrate the carefully crafted provision worked out by the Founders for ensuring the essential independence of the Third Branch.

I. THE CENTRAL ISSUE

A. Congress's Problem: Creating a Federal Pay Structure

Ascertaining Congress's purpose in enacting the 1989 Ethics Reform Act requires an examination of the historical context within which the act was crafted, and consideration of the contemporaneous legislative record that accompanied its enactment.[4] Comparing that record with

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[4] I am fully sensitive to the general principle that in interpreting statutes judges properly begin, and in most cases end, with the language of the statute, not the language of the individuals who voted for or against the statute. As my record reflects, I am a proponent of that rule. *See, e.g., VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1579-80 (Fed. Cir.

that of the 1975 Adjustment Act will help in understanding the Supreme Court's view of these matters, as expressed in the Court's opinion in *Will*. And, in addition to looking at purpose, we must also look at structure, in particular the structure of the 1989 Act – considering its provisions in pari materia – and compare that structure with that of the 1975 Act. This, too, will assist in understanding Congress's intent in enacting the two different acts.

In order to put in context the purpose and structure of the 1975 and 1989 acts, it is helpful to look back at the history of Congress's efforts at constructing a pay structure for federal employees, particularly senior employees, including the members of Congress themselves. At bottom lies a problem that has plagued the nation since its inception.

The Constitution assigns to Congress the responsibility for establishing the compensation to be received by senior federal officials: Members of Congress "shall receive a Compensation for their Services, to be ascertained by Law" (U.S. Const. art. I, § 6); the President shall receive "a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected" (U.S. Const. art. II, § 7); the Judges shall "receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office" (U.S. Const. art. III, § 1).

1990); *see also Am. Tel. & Tel. Co. v. United States*, 177 F.3d 1368, 1381-82 (Fed. Cir. 1999) (en banc) (Plager, J., dissenting). This case is one of those that proves the validity of the rule by allowing the exception.

From the very beginning, "the historic turmoil surrounding enactment of salary increases" has been a political problem for Congress. 1989 Commission on Executive, Legislative and Judicial Salaries, *Fairness For Our Public Servants* at 5 (1988) [hereinafter "1989 Quadrennial Commission Report," or simply "Report"]. The Report cited as an example the statement by the Democratic Convention in 1873, responding to a $2,500 increase Congress had just voted itself: "We condemn and denounce the salary grab, and all Congressmen, Democratic or Republican, who voted for it. . . . " Report at 6. More directly apropos of the problem before us, the 1989 Quadrennial Commission Report further noted that "[f]rom the beginning, the level of compensation for Executive branch officials and for judges has been dominated by the level Congress was willing to legislate for itself." *Id.*

Modern-day federal salary policy begins with the 1967 Federal Salary Act,[5] an attempt by Congress to solve the salary setting problem by changing the process for fixing salary levels. "The Federal Salary Act sets forth as public policy the necessity for a regular review every 4 years of the compensation of the top officials of the three branches of government."[6] The Act established the Commission on Executive, Legislative, and Judicial Salaries, which was instructed to meet and report quadrennially. In the way of government commissions, this became

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[5] Pub. L. No. 90-206, Title II, § 225, 81 Stat. 613, 642-45 (1967) (codified as amended at 2 U.S.C. §§ 351-61).

[6] 119 Cong. Rec. S19, 418 (1973) (statement by Senator McGee when introducing legislation that led to the 1975 Adjustment Act).

known as the Quadrennial Commission; the Report referred to above was the product of the 1989 Quadrennial Commission's activity.

The Commission makes its recommendations to the President regarding salary levels for the senior officials of the three branches; the President in turn makes his recommendations to Congress. The President's recommendations take effect subject to a process for Congressional review. That review process has changed over the years. As a result of a 1985 amendment, the process in effect at the time the 1989 Ethics Reform Act was passed provided that the President's recommendations became effective automatically, unless and to the extent that a joint resolution of disapproval of all or part of the recommendations was agreed to by both Houses within thirty calendar days after the President's submission.[7]

In commenting on the overall unworkability of the system, the 1989 Quadrennial Commission said:

> Over the years, the "Quadrennial Commission" process has sometimes resulted in approval of the President's recommendations and sometimes not. Although the political difficulties Members [of Congress] face regarding salary increases have been somewhat cushioned, these difficulties cannot be eliminated until Congress enacts legislation delegating the final power to set high-level Executive, Legislative and Judicial salaries either to the President or to a bipartisan commission. . . .

Report at 7.

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[7] Pub. L. No. 99-190, § 135, 99 Stat. 1185, 1322-23 (1985).

It is worth noting that the "high-level" officials to which the Commission's recommendations are addressed includes the Vice President and 833 other Executive Branch positions; all Members of Congress and ten Legislative Branch executives, totaling 549; and 1,113 judges plus two Judicial Branch executives.[8]

Three years after enacting the 1967 Federal Salary Act and its Quadrennial Commission system, Congress enacted the Federal Pay Comparability Act of 1970 (the "Comparability Act").[9] This Act was intended to address the problem of the disparity between salaries paid to federal government employees and the higher salaries paid to persons in the private sector engaged in comparable work. The Act applied to those federal employees (generally career service employees) who are paid under what are known as the statutory pay systems; this includes persons under the General Schedule, the Foreign Service, and certain groups of professionals in the Veterans Administration. The Act provided for a report based on information from the Bureau of Labor Statistics, and for an Advisory Commission on Federal Pay to recommend to the President, on the basis of the report, appropriate pay adjustments.

Over the years the effectiveness of the Comparability Act has been quite limited. For example, as the 1989 Quadrennial Commission noted, between 1984 and 1989

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[8] These figures do not include a number of other positions whose salary levels are affected by Commission recommendations. *See* 1989 Quadrennial Commission Report at 9.

[9] Pub. L. No. 91-656, 84 Stat. 1946.

the Advisory Commission made six annual recommendations for increases ranging between 18 and 26 percent; the increases Congress put into effect ranged between 0 and 4.1 percent.[10]

Five years after establishing the Comparability Act pay formula for the benefit of general federal workers, Congress in 1975 enacted the Executive Salary Cost-of-Living Adjustment Act (the "Adjustment Act"),[11] which was supposed to provide comparability pay adjustments specifically for Members of Congress, judges, positions under the Executive Schedule (the top level of Executive appointees), and other top positions in the three Branches. The Act was intended to link pay adjustments for senior federal officials to the annual pay adjustment process for the other pay systems.

B. The 1975 Adjustment Act and the Will case

1.

United States v. Will, 449 U.S. 200 (1980), was the consequence of a challenge to Congressional blocking acts aimed at preventing COLAs for judges under the 1975 Adjustment Act. In the case now before us, the Government bases much of its argument in support of the constitutionality of the blocking acts involved here on the Supreme Court's pronouncements in *Will*. The majority agrees with the Government, and relies equally on the language of *Will*.

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[10] 1989 Quadrennial Commission Report at 34 (App. A).

[11] Pub. L. No. 94-82, Title II, 89 Stat. 419, 419-23 (1975).

To understand the *Will* case, and to see how its pronouncements relate to the case at hand, it is necessary to examine in some detail the terms of the Adjustment Act, and their origins. The Adjustment Act grew out of efforts by concerned members of Congress, in particular in the Senate, to address the inequities in the manner in which salaries were set for senior government officers. In 1973, the Senate proposed that the Quadrennial Commissions be changed to biennial, so that their recommendations for salary adjustments would be made every two years instead of every four. *See* S. 1989, 93d Cong. (1973) (introduced June 13, 1973; passed by the Senate July 9, 1973). The bill failed in the House. In 1974, the Senate Committee on Post Office and Civil Service undertook hearings to consider three bills (S. 3049, S. 3550, and S. 3551) relating to salary adjustment mechanisms for senior officials. *Executive, Legislative, and Judicial Pay, Hearings Before the Senate Committee on Post Office and Civil Service*, 93d Cong. (June 19-20, 1974). One bill would raise salaries for executive branch officials pursuant to a recommendation of the President; one would extend the raises to the other two branches; and the third would establish a procedure for annual pay assessment and adjustment for all three branches, doing away with the quadrennial review process.

Meantime, in June 1975, the House adopted a minor piece of legislation to bring the Postal Service under the Occupational Safety and Health Act. When the House bill, H.R. 2559, came before the Senate, the Senate Committee on Post Office and Civil Service used it as a vehicle for addressing the salary issue. The original Title I, relating to the Postal Service, was retained, but an entirely

new Title II, the "Executive Salary Cost-of-Living Adjustment Act," was added.[12] The new Title, in section 205, provided for adjustments to the salaries of federal judges; other sections contained provisions for adjusting salaries for Executive Branch officials and for officials of the Legislative Branch, including members of Congress.[13]

Subsection (a)(1) of section 205 (set out in the footnote below[14]) contained the language that provided the formula for an upward salary adjustment for judges any

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[12] S. Rep. No. 94-333 (1975).

[13] Section 202 provided similar adjustment formulas for the Executive Schedule pay rates; section 203 for the Vice-President; section 204 for members of Congress, the Comptroller General, and certain other legislative branch officials.

[14] Section 205(a)(1) provided that:

> Chapter 21 of title 28, United States Code, relating to general provisions applicable to courts and judges, is amended by adding at the end thereof the following new section:
>
> § 461. Adjustments in certain salaries
>
> Effective at the beginning of the first applicable pay period commencing on or after the first day of the month in which an adjustment takes effect under section 5305 of title 5 in the rates of pay under the General Schedule (except as provided in subsection (b)), each salary rate which is subject to adjustment under this section shall be adjusted by an amount, rounded to the nearest multiple of $100 (or if midway between multiples of $100, to the next higher multiple of $100) equal to the percentage of such salary rate which corresponds to the overall average percentage (as set forth in the report transmitted to the Congress under such section 5305) of the adjustments in the rates of pay under such Schedule.

time an adjustment (a COLA) in the rates of pay under the General Schedule "takes effect." This formula was applied to judicial salary rates by later subsections of section 205, which amended the specific statutory provisions contained in Title 28 that specified the rates of pay for the various categories of Article III judges by adding, after each, the phrase "as adjusted by section 461 of this title" – "section 461" being a reference to the codified section where the formula of section 205(a) would be placed.

In introducing the bill, Senator McGee, chairman of the committee, explained that discussions had been going on for several months involving his committee, the companion committee in the House, the Comptroller General, the President, and the Chief Justice. "We have united on a very simple legislative proposal for this body, recognizing that our earlier legislation did not anticipate or at least did not foresee the impact of double digit inflation on the reforms that were made in earlier years, both in the comparative law for the civil service employees and for the Salary Reform Act of 1967." 121 Cong. Rec. S25,373 (July 28, 1975). He then described the existing mechanism for General Schedule adjustments under the Comparability Act, and stated that "all the pending measure does is put under the same mechanism . . . those persons at the executive level, . . . and the judiciary and the legislative branches of the Federal Government." *Id.* "H.R. 2559 does nothing to interfere with this present pay-setting mechanism." *Id.* at S25,375.

Chairman McGee further explained that "[t]his bill would only provide that the annual pay adjustment made for the bulk of Federal employees in the general schedule

and other statutory salary systems would be applied *at the same time* and at the same percentage rate to the salaries of those officials and employees who have received no pay raises since March 1969." *Id.* at S25,374 (emphasis added).

Not unexpectedly, several Senators objected to Title II, and in particular to including Congress in the proposed COLA formula. *See, e.g., id.* at S25,379 (remarks of Senator Harry F. Byrd: "What this tends to do is this insulates Congress against inflation. And yet, in my judgment, Congress is the major cause of the inflation we are facing today."); *see also id.* at S25,380 (remarks of Senator Allen, proposing an amendment to eliminate Congress from the bill). After rejecting several efforts to amend, including one to strike Title II in its entirety, the Senate voted 58 to 29, 12 not voting, to approve H.R. 2559 as amended by the committee.

When the House considered the amended bill, H.R. 2559, containing the Senate's new Title II, Title II was the subject of a rancorous debate. *See* 121 Cong. Rec. H25,826-41 (July 30, 1975). The spokesperson for the amended bill, Congressman Derwinski of Illinois, started the debate:

> The language added in the Senate is *not a pay raise* for Members of Congress or any of the other positions in the executive or judicial branches mentioned in the bill. It is a *procedural change* in the law which will allow for a cost-of-living adjustment in October, at the same time that employees under the General Schedule receive the same adjustment. Therefore, talk of an 8.6 percent pay increase directly resulting from this bill is incorrect . . . We are considering a *procedural change* in the law at this time and will have the opportunity later this fall to agree or disagree to a percentage adjustment in salaries."

Id. at H25,827 (emphasis added).

He went on to describe how, since 1969, senior government officials, including judges, had seen the purchasing power of their salaries reduced by as much as 32 percent. This was because their salaries had remained frozen, while the Consumer Price Index, a measure of inflation, had increased 42 percent. The position of these officials was contrasted with that of the General Schedule federal employees, who had received 38 percent comparability salary increases during that period.

Mr. Derwinski referred to the annual report of the Chief Justice, given in February 1975, in which the Chief Justice had called for an immediate 20 percent increase in judicial pay scales as a first step toward catch-up. *Id.* at H25,828. It was noted that the proposed bill contained no catch-up provision, and at most would simply halt further erosion in the pay levels. Ironically, in light of what occurred in subsequent years, speakers both pro and con agreed that in particular the judiciary needed the increases the bill provided; no one spoke against the judiciary.[15]

The opposition to the bill centered on whether Congress should give itself a pay increase every time the

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[15] *E.g.*, Congressman Hays: "Everybody wants to give the judges a raise. I do not hear anybody saying they should not have a raise . . . . " *Id.* at H25,835.

General Schedule received a cost-of-living adjustment. Several members argued that it was Congress's spending that was the cause of the high inflation the country was then experiencing. To give themselves such raises was to encourage even more profligate spending.

The proponents of the amended bill made a particular point that the pay-fixing procedures under existing law failed to deal adequately with the problem of inflation. They pointed to the fact that Congress had rejected the 1974 recommendations of the President for salary adjustments. *Id.* at H25,829. They argued that, even if adjustments were made, the four-year adjustment cycle under the Quadrennial Commission process was too widely spaced. Efforts to shorten that cycle to two years had been defeated. *Id.* at H25,830. They introduced into the record a letter from President Ford explaining the critical need for Congress to address the question of pay adjustments for senior officials, and supporting the proposed bill.

For our purposes here, it is important to note that both the proponents and the opponents of the bill viewed § 461, the section added to the United States Code by Title II of the bill, as establishing nothing other than a formula, a procedural device for adjusting salaries when the time came to make the decision that COLAs should be granted. The proponents recognized that the bill provided for an increase for senior officials when the GS employees received one, but assured the House that there would be a further decision in any given year as to whether a COLA would be granted. The opponents, though referring to the bill as having an "automatic" feature, primarily focused their objections on giving

themselves a raise based on the cost of living. *See, e.g.*, the remarks of Congressman Rhodes ("[I]t is with reluctance that I rise to oppose this rule. I do not oppose all of it. I think very definitely that the judiciary is in need of a pay raise. . . . The Congress has more to do with the level of the cost of living than any other part of the Government. . . . I just cannot agree with the idea that we should be put in the position of benefiting by an increase in the cost of living."); Congressman Shuster ("[I]t is wrong for Members of Congress to give themselves an automatic cost-of-living increase because it is the big spenders in Congress who cause the cost of living to rise through deficit spending."). *Id.* at H25,834.

In the end, the House passed the bill with the Senate amendment by one vote, 214 to 213, with 7 members not participating. The President signed the "Executive Salary Cost-of-Living Adjustment Act" into law on August 9, 1975.

2.

Since compensation of judges is set at an annual figure and paid monthly, see 5 U.S.C. § 5505, any annual change in salary under the Adjustment Act would take effect at the beginning of the Government's fiscal year, October 1. In October 1975, by act of Congress pursuant to the 1970 Comparability Act, General Schedule salaries were increased by an average of 5 percent. Federal judges and other senior officials covered by the 1975 Adjustment Act received similar increases. In fiscal years 1976, 1977, 1978, and 1979, Congress again provided salary increases for the GS employees pursuant to the Comparability Act, but in each of those years Congress enacted legislation

that purported to deny the raises to members of Congress, judges, and the other senior officials covered by the Adjustment Act.

The exact details of each of these pieces of blocking legislation, *see Will*, 449 U.S. at 205-09, and the arguments concerning their scope, are unnecessary to the point of this analysis. Suffice it to say that, as a consequence of their enactment, no judges (or other senior officials) received a COLA for those years.

In 1978, 13 federal district judges filed suit against the United States in the District Court for the Northern District of Illinois, alleging that Congress's blocking legislation for fiscal years 1976 and 1977 was invalid as an unconstitutional diminution in salary contrary to the provisions of Article III. The suit was brought as a class action. Subsequently, in 1979, basically the same group of judges brought a similar suit with regard to fiscal years 1978 and 1979.

The trial court, which handled both cases, certified the cases as class actions, and rendered summary judgments for the plaintiff judges. The Government appealed to the Supreme Court, where the cases were consolidated. In addition to discussing the scope of certain of the blocking legislation, a large part of the Court's opinion in the *Will* case was devoted to questions regarding jurisdiction and the application of the Rule of Necessity. We are not concerned with those issues here; it is the Court's treatment of the Compensation Clause issue that concerns us.

In addressing the Compensation Clause issue, the Court first expounded on the role of the Clause and its

central place in the Founders consideration of Article III of the Constitution. The Court traced the roots of the Clause to the long standing Anglo-American tradition of an independent judiciary: "A Judiciary free from control by the Executive and the Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government." *Will*, 449 U.S. at 218. After reviewing the history of the idea that judges' compensation was related to their independence, an idea traced back to an English statute of 1701, the Court explained how both James Madison and Gouverneur Morris were instrumental in crafting the provision in the Constitution which captured the idea that: "The Judges, both of the supreme and inferior Courts, shall . . . receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. Const. art. III, § 1.

The Court noted that, in addition to promoting judicial independence, the Compensation Clause serves to ensure that lawyers who leave a lucrative practice to join the federal judiciary can at least have assurance that their salaries will not be diminished. This assurance, said the Court, "has served to attract able lawyers to the bench and thereby enhances the quality of justice." *Will*, 449 U.S. at 221 (citing *Evans v. Gore*, 253 U.S. 245 (1920) and Kent's Commentaries).

Turning to the matter before it, the Court began by concluding that, in enacting the blocking legislation, "[t]he clear intent of Congress in each year was to stop for that year the application of the Adjustment Act." *Id.* at 224. The question was, had Congress acted in a way that constitutionally succeeded in that effort. The Court then

analyzed the circumstances that prevailed in each year, with particular attention to exactly when the blocking legislation was enacted.

Because of the potential confusion in dates resulting from the fact that the Government's fiscal year does not coincide with the calendar year, the Supreme Court in its decision in the matter referred to these years as years 1 through 4. For consistency, I will do likewise. With regard to year 1, the Court concluded that the blocking legislation was enacted after the COLA increase under the Adjustment Act had taken effect. Under the Adjustment Act, the increase "was operative with the start of the month – and the new fiscal year – at the beginning of the day." *Id.* at 225. The blocking legislation was signed by the President during the day of October 1, after the salary increase was already in force. The Court held that the blocking legislation "diminished" the compensation of federal judges, and was, as to them, unconstitutional. *Id.* Since the blocking legislation in year 4 was also effective after October 1 of that year, the same result obtained. *Id.* at 230.

Years 2 and 3 presented a different problem. In both of those years, the blocking legislation was enacted prior to October 1. The only issue, then, was whether Congress, in enacting the Adjustment Act, had intended to "vest" future raises in the judiciary, thus precluding later rescission of the right to the raises. The District Court held that Congress had so intended, and that the blocking legislation in years 2 and 3 were equally unconstitutional. The Supreme Court disagreed, and held that the blocking acts in years 2 and 3, passed before the raises became payable

in each of those years, were effective to deny judges the scheduled COLAs.

The Government here argues that *Will* controls the case before us. As a result of a 1990 revision of the 1970 Comparability Act, the effective date for cost-of-living adjustments is the first day of the first pay period beginning on or after January 1.[16] In each of the years in question in these cases, the blocking acts were enacted prior to that date. Just as in years 2 and 3 in the *Will* case, the Government argues, no vested rights existed in the judiciary prior to the time that the COLAs actually became part of the judges compensation in each year. Thus the blocking legislation, enacted before the adjustment to the salaries appeared in the paychecks, did not run afoul of the Compensation Clause. The parallel to the case at hand is obvious, and thus a key issue in this case is the Supreme Court's treatment of the Adjustment Act in *Will*, and whether the circumstances in *Will* dictate the outcome here.

The Supreme Court began its consideration of the matter by stating the obvious: the Compensation Clause does not erect an absolute ban on all legislation that conceivably could have an adverse effect on compensation of judges. *Id.* at 227. Thus judges must pay income taxes along with all other citizens. *O'Malley v. Woodrough*, 307 U.S. 277 (1939).

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[16] Federal Employees Pay Comparability Act of 1990, Pub. L. No. 101-509, § 529, 104 Stat. 1389, 1427 (codified at 5 U.S.C. § 5303).

Importantly, the Court, following the lead of both the Senate and House proponents of the legislation, characterized the Adjustment Act as an act that "did not . . . alter the compensation of judges; it modified only the formula for determining that compensation. Later, Congress decided to abandon the formula as to the particular years in question." *Will*, 449 U.S. at 227. From this the Court concluded that Congress's "departure from the Adjustment Act policy in no sense diminished the compensation Article III judges were receiving; it refused only to apply a previously enacted formula." *Id.*

In response to the plaintiff judges' argument that this case is different from *Will* because the statute here is not simply a formula for determining compensation, the Government points to other language in the *Will* opinion that suggests a broader rule. As I noted at the beginning of this opinion, there is language in *Will* that "a salary increase 'vests' for purposes of the Compensation Clause only when it takes effect as part of the compensation due and payable to Article III judges." *Id.* at 229. The Government notes further that the Court went on to say that the Compensation Clause did not prohibit Congress from repealing the "planned but not yet effective" COLA for year 2 (and necessarily 3) when it acted before October 1, "the time [the COLA] first was scheduled to become part of judges' compensation." *Id.* The Government finds this language conclusive of the issue before us.

I disagree. As I have explained, the statement that a salary increase vests for purposes of the Compensation Clause only when it takes effect as part of the compensation due and payable to a judge necessarily asks the question: When is the salary increase due and payable?

Though I can agree with the Government that, read broadly, and without due consideration for differences between the Adjustment Act and the Ethics Reform Act, this language could be applied undiscriminatingly to the case before us, I decline to read the language independent of the context in which it was written, and without regard to important differences between the two statutes at issue.

In the Supreme Court's view, as I have noted, the purpose of the 1975 Adjustment Act was simply to establish a formula and a mechanism for applying it, so that Congress, when and if it chose to grant senior government officials a cost of living increase, would have in place the structure for doing so. The debate in the Senate and particularly the House, with special reference to the remarks of the sponsors, quoted above, supports that view.

As the Court viewed it, nothing in the history of the Act, or in its structure, suggested any commitment by Congress. The Court described the Act as simply "a method of calculating salaries" which Congress should be able to alter before it is executed. *Id.* at 228. To hold otherwise, said the Court, "would mean the Judicial Branch could command Congress to carry out an announced future intent as to a decision the Constitution vests exclusively in the Congress." *Id.* In a footnote following this statement, the Court analogized the formula provided in the Act to "an indexing scheme." *Id.* at 229 n.33. Thus the Court concluded that the Adjustment Act itself did not cause future COLAs to vest, at least not until the scheduled date when the increased payments, pursuant to the formula, were actually paid. As a result,

in two of the years at issue Congress effectively recluded the mechanism from operating to grant COLAs; in two of the years Congress failed to act in time so that the established mechanism operated as prescribed.

C. The 1989 Compensation Issue and the Ethics Reform Act

1. The Quadrennial Commission Report

The 1975 Adjustment Act was only one of the compensation statutes that the 1989 Quadrennial Commission, in its Report on government salaries, summarized with the words: "their application to date has failed to achieve comparability by a wide margin." 1989 Quadrennial Commission Report at 13. The Report documented the continuing loss in purchasing power sustained by senior officials over the past twenty years: "Even though senior level federal salaries have been increased . . . since 1969, the current salaries of [these officials] have declined in constant dollars to approximately 65% to 70% of their salaries in 1969. In contrast, other wage and salary earners . . . have on average modestly increased their purchasing power in constant dollars by about 1.5% since 1969." *Id.* at 13. The reference to the year 1969 stems from the fact that 1969 was adopted as the baseline year for salary comparisons by the Quadrennial Commissions, as well as by the Administrative Office of the United States Courts for judicial salary studies. That was the first year in which Congress allowed to go into effect a President's recommended federal pay raise, based in turn on the recommendations of the First Quadrennial Commission.

The 1989 Quadrennial Commission then made specific recommendations regarding salary levels for the three Branches. For the Executive Branch, the Commission was particularly concerned about compression at the top. This was the problem created by the statutory salary structure for senior executive officials, causing the salaries of the lower levels of such officials to be frozen for years.[17]

For the Legislative Branch, the Commission focused on the issue of honoraria – "payments for public appearances to deliver a talk or engage in a colloquy at the invitation of some non-governmental group, often one with a material interest in pending or anticipated legislation." Report at 24. The Commission detailed the problems with the widespread practice of accepting honoraria (Congressional data reported some $9.8 million in honoraria received in 1987 by Members of the House and Senate),[18] and noted that "[t]he only principled argument that can be made for the practice of accepting honoraria is that official salaries are far too low and must be supplemented by honoraria so that a public official can meet his minimum family obligations." The Commission called for the practice to be terminated by legislation "at or about the time that the Commission's recommended salary increases . . . are allowed to take effect." *Id.*

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[17] 5 U.S.C. § 5308 provides that General Schedule employees may not be paid at a rate in excess of the basic rate for Level V of the Executive Schedule.

[18] *Report of the Bipartisan Task Force on Ethics on H.R. 3660, Government Ethics Reform Act of 1989*, 101st Cong. (1989), 135 Cong. Rec. H9256.

With regard to judicial salaries, the 1989 Quadrennial Commission Report detailed the inadequacies of current judicial compensation, and stated that "[t]he constant dollar value of federal judges' salaries has been eroded to less than 70% of what it was in 1969." *Id.* at 28. With regard to the honoraria issue, the Report noted that, compared to the House and Senate, the acceptance of honoraria has remained a relatively minor source of supplemental income for the judiciary, but that "[i]f Congress allows substantial increases for all branches to take effect while it also abolishes honoraria for its own members, it is appropriate that honoraria be abolished in all three branches." *Id.* at 30.

2. The Task Force Report

At the same time that the 1989 Quadrennial Commission was conducting its hearings on salaries – hearings in which Members of Congress, Executive officers, and judges participated – and was developing its report, Congress itself was engaged in a comprehensive review of ethics rules and regulations. A Bipartisan Task Force on Ethics was appointed in February 1989 by the Speaker of the House, charged with reviewing all rules, regulations and statutes governing the official conduct of members of the House. In November 1989 the Task Force issued its report. *Report of the Bipartisan Task Force on Ethics on H.R. 3660, Government Ethics Reform Act of 1989*, 101st Cong. (1989), 135 Cong. Rec. H9253 [hereinafter "Bipartisan Task Force Report"].

The report stated that the principal areas addressed by the Task Force were subjects such as gifts, honoraria

and outside earned income, financial disclosure, and use of official resources. The report went on to note, however, that "[d]uring the course of its review, the task force also examined issues relating to the compensation of Members and other high government officials." *Id.* at H9253. The recommendations of the Task Force were contained in what the report described as "the most far-reaching government-wide ethics legislation in over a decade." *Id.* This was the origin of the 1989 Ethics Reform Act.

The proposed act as recommended by the Task Force dealt with a number of issues, some of which were directed specifically at the House, its rules and practices, and some of which were addressed government-wide. The proposed legislation contained an outright ban on honoraria for all government officials, and imposed severe restrictions on outside earned income. It reconstituted the Quadrennial Commission into a new Citizens Commission on Public Service and Compensation, and made that commission's salary recommendations, through the President, subject to Congressional approval, rather than veto. It provided for House (and later Senate) ethics rules changes, and for tightened financial disclosure requirements.

Importantly for our purposes here, the Task Force report and recommendations spoke directly to the issue of the relationship between placing limitations on honoraria and outside earned income, and the need for adjustments in the salaries of upper-level government officials. The Task Force noted that, of the seven commission salary reports and recommendations issued during the twenty-two years in which the Quadrennial Commission process for salary adjustments had been in effect,

only three had been implemented. *Id.* at H9264. Most recently, Congress in February 1989 had rejected the 51 percent pay increase requested by the President, which request was based on the recommendation of the 1989 Quadrennial Commission. *Id.*

The Task Force stated, "Directly related to this problem are the attempts by some top officials who remain in government to augment their salaries through outside activities, simply to keep up with the rising cost of living. . . . The important point is that [the commissions][19] which viewed these problems from different perspectives came to the basic conclusions that top public officials should be better compensated, that honoraria should be banned, and that outside employment should be tightly restricted." *Id.* at H9264. The Task Force then recommended that the 1989 and 1990 comparability adjustment that went to other federal workers but was denied to top government officials, including judges, be restored. The Task Force recommended further that beginning in 1991 a separate index, tied to the rate of change in the Economic Cost Index (ECI), be used to establish cost-of-living increases for these officials, and that top Executive Branch officials, Members of Congress, and judges should receive an immediate 25 percent salary increase, all *"as part of a comprehensive ethics package which both abolishes*

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[19] During this period the inadequacies in government salaries were the subject of other studies as well. *See, e.g.*, National Commission on the Public Service (Volcker Commission), *Leadership for America: Rebuilding the Public Service* (1989), *in* House Comm. on Post Office and Civil Service, 101st Cong., *Report and Recommendations of the National Commission on the Public Service* (Comm. Print 1989).

honoraria and imposes strict limits and restrictions on any outside income and employment." *Id.* at H9265 (emphasis added). The Task Force further elaborated on the connection between adequate compensation and restrictions on outside income, saying:

> The task force wishes to emphasize that *it considers the salary provisions of its recommendations to be an integral part of the total ethics package being proposed.* Serving as a senior government official is and should be a full-time job and should be compensated accordingly. Along with adequate compensation there should be less need to supplement income from outside sources.

Id. (emphasis added).

Legislation entitled the "Government Ethics Reform Act of 1989," containing the recommendations of the Task Force, was submitted as H.R. 3660 on November 15, 1989, and introduced in debate the next day. In his opening remarks, Congressman Fazio, one of the sponsors and co-chair of the Task Force, noted that "this comprehensive overhaul of House ethics rules and conflict of interest laws has the full approval of the President, as well as Democratic and Republican leadership in the House." 135 Cong. Rec. H29,482 (1989).

In discussing the changes regarding future COLAs, Congressman Fazio stated: "A final, important part of the compensation package is included in section 304. Beginning in 1991, senior officials will be governed by changes in the employment cost index. . . . This should remove senior salaries from their current vulnerability for political demagoguery. *Our objective is to maintain fair annual*

COLA's for all employees, including Members, judges, Cabinet, and other executive level personnel." Id. at H29,483 (emphasis added).

Under the bill as proposed, General Schedule COLAs would continue to be based on the standard cost-of-living index, while the COLAs for senior officials, including judges, would be based on the Economic Cost Index ("ECI")[20] The ECI is not actually a cost-of-living index as that is generally understood, but instead reflects private sector changes in wages and salaries. Under the proposed change, the COLAs to be given would be the ECI as determined by the Bureau of Labor Statistics, less one half of one percent, with a cap of 5 percent in any one year.

Congressman Kastenmeier, chair of the Subcommittee on Courts, Intellectual Property, and the Administration of Justice, rose in support of the bill, and stated: "I compliment the authors of this bill for their foresight in including provisions relating to a salary increase for Federal judges, automatic COLA's for judges, and a senior judge certification procedure." *Id.* at H29,497.

Several Congressmen who rose in opposition to the pay raise portions of the bill objected to the fact that the pay raise provisions were integrated into the ethics reform provisions, and that there would be only one vote

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[20] The difference in indices did not remain in effect. In 1990, as part of the revisions to the 1970 Comparability Act, Congress applied, effective in 1991, the same index (ECI) to the General Schedule employees as was applied to the senior officers under the 1989 Ethics Act. 5 U.S.C. § 5303.

on the entire package.[21] The proponents of the bill agreed that the bill was a package, and was so intended. Congresswoman Martin, another sponsor and co-chair of the Task Force, stated: "The Ethics Reform Act of 1989 is a comprehensive and interrelated package that either rises or falls on its merits – one bill, indivisible." *Id.* at H29,484. The bill passed the House 252 to 174. *Id.* at H29,512-13.

When the bill was taken up by the Senate, there was a contentious debate between Majority Leader Mitchell and Senator Helms over whether the pay raise provisions should be separated from the ethics reform provisions, Senator Helms insisting that the two should be considered separately. Senator Helms lost, and the Senate passed the bill as a package, but with special provisions applicable to the Senate for phasing in the limits on outside income. The final bill, as passed by both the House and Senate, became the Ethics Reform Act of 1989, Public Law 101-194, and was signed into law by the President on November 30, 1989. The final bill included the provision for COLAs for judges and other senior officials as recommended by the Task Force.

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As the discussion demonstrates, in enacting the 1989 Ethics Reform Act Congress had a different purpose, and

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[21] *E.g.*, Congressman Johnson, who opposed the bill, noted that "I am not sure that the pay and ethics issues should be philosophically linked but, as a practical matter, they are linked," 135 Cong. Rec. H29,502 (1989); Congressman Crane complained that the packaging of the bill was a less than candid effort to get a pay raise through under the guise of ethics reform, 135 Cong. Rec. H29,499 (1989).

utilized a different structure, than when it enacted the 1975 Adjustment Act, the act that was construed by the Supreme Court in *Will*. The purpose of the 1989 Act was to reform certain practices involving money-raising efforts by senior government officials that caused questions about conflict of interest and related ethical concerns. These questionable practices involving fund raising from private sources were to be prohibited, in exchange for more adequate government funding. The more adequate government funding had two components. One was an immediate "catch-up" increase in salaries for these officials. The other was a commitment to regular annual COLAs whenever inflationary pressures warranted.

The structure of the Act reflects its purpose. In addition to the immediate catch-up increase, the Act provided that there would be an automatic pay rate adjustment for senior government officials any time a COLA was awarded to General Schedule government employees. Congress's clear purpose and intent was to compensate senior government officials, through automatic pay rate adjustments, for the continued prohibition against access to private sources of funding.

There is no ambiguity about Congress's intent. The committed pay adjustments were in exchange for the prohibitions on outside earnings the Congress imposed on itself, as well as on the other officials covered by the act. Pay adjustments were to be automatic; whenever increases in the cost of living, previously met by those outside earnings, were needed, they were to be met instead by salary rate adjustments. The President and his representatives played a pivotal role in the negotiations

leading to the adoption of the Act, and were active participants in the bargain struck.

When a political bargain is struck by members of the legislative branch, and codified in legislation, it is appropriate that courts recognize and honor the bargain.

> In the case of legislation, parties to a statutory contract are the members of the legislative coalition that enacted the statute, and the contract is an agreement over public policy. In the tradition of the economic analysis of contract law, . . . the methods employed by the courts to interpret legislation should be consistent across cases, should be faithful to the bargain struck by the contracting parties, and should take into account the feedback effect of interpretive principles on the efficiency of future negotiations and agreements.

McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 Geo. L.J. 705, 705-06 (1992).

The Supreme Court in recent years has expressly recognized the role of legislative compromise in the interpretive process.[22] *See, e.g., Gen. Motors Corp. v. Romein*, 580 U.S. 181, 191 (1992) (upholding the statutory provisions at issue, stating that they were necessary to "preserve the delicate legislative compromise that had been struck by the 1980 and 1981 laws"); *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 747 (1989) ("[T]he

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[22] The majority attacks this proposition on the ground that a statute reflecting a political bargain cannot override a constitutional principle. See maj. op. at 34. That of course misses the point, since there is no constitutional principle to override.

enactment of the 1965 compromise . . . demonstrates that Congress intended to provide . . . . "); *id.* at 748 n.14 ("Strict adherence to the language and structure of [an] Act is particularly appropriate where, as here, a statute is the result of a series of carefully crafted compromises."); *United States v. Taylor*, 487 U.S. 326, 336 (1988) ("[Appellate] review must serve to ensure that the purposes of the Act and the legislative compromise it reflects are given effect."); *see also VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1582 (1990) (discussing the role that legislative compromise played). For a collection and discussion of the relevant Supreme Court cases, see Courtney Simmons, *Unmasking the Rhetoric of Purpose: The Supreme Court and Legislative Compromise*, 44 Emory L.J. 117 (1995).

That later Congresses, perhaps with different members and different political agendas, may choose to pursue different goals does not change the nature of the compromise struck and the resulting purpose that the 1989 Congress had when it enacted the Ethics Reform Act. As I read the statute and the record that led up to its enactment, Congress's purpose and intent was to commit itself to making the salary rate adjustments for senior officials due and payable with the enactment of the Ethics Reform Act. The adjustments were to be automatic, subject only to the 'trigger' in any given year of a COLA to the General Schedule employees.

So long as Congress chooses to keep in place the 1989 legislation containing both the prohibitions on fundraising activities and the concurrent commitment to continued public funding in exchange therefore, I see no alternative but to conclude that Congress intended to

commit itself to make the payments provided for under the Act. In terms relevant to the issue before us, the entitlement of the beneficiaries of the Act to those exchange payments "took effect" with the enactment of the prohibitions.

The majority purports to reduce the judges' position "to the contention that Congress, once it has enacted a law promising a future pay increase to federal judges, may not, as a constitutional principle, amend downwards or abrogate that promise . . . . " Maj. op. at 22. I do not believe that the judges made any such simplistic contention. At oral argument Judge Clevenger posed to counsel a hypothetical that posed such a simplistic case, *see* maj. op. at 19, to which he received a simplistic answer. Neither the question nor the answer addressed the underlying issue of context or purpose behind the legislation.

The majority devotes some pages to attacking the opinion of the district court in this case, maj. op. at 23-30, and particularly the district court's view of *United States v. More*. I need not engage in that debate. On appeal we review judgments, not opinions. The correctness of the district court's judgment in favor of the plaintiffs is the issue before us.

In my view, for the reasons I have explained, the judgment of the district court was correct. Any effort by Congress after 1989 to deny the payments, once a 'trigger' award to the General Schedule had been made, was an unconstitutional diminution in compensation in violation of Article III of the Constitution. As a result of the legislative compromise reached, and by Congress's own purpose and intent, the right to those COLA adjustments

vested, were in effect and due and payable, with the enactment of the 1989 Ethics Reform Act. Nothing in *Will* is inconsistent with that result, and certainly there is nothing in the Constitution to dictate otherwise. On the contrary, to conclude otherwise is to deny to Congress the power to make such a decision, and is to undermine the judiciary's right to benefit therefrom, both a power and a right expressly granted by the Constitution.

This said, there should be no misunderstanding about what I would hold. In my view, Congress was under no obligation to commit itself to future compensatory payments to senior officials as a precondition to establishing its ethics standards. That was a choice Congress made. Further, Congress is under no obligation to keep in place the mechanism, contained in the 1989 Ethics Reform Act, for compensating senior officials, including judges. That is a choice open to Congress. As the recited history of federal salary law demonstrates, Congress from time to time has revised the salary laws in an attempt to find a solution to the political dilemma arising from setting its own compensation, a dilemma to which it has chosen to tie senior executive and judicial salaries as well.

Nor does my view say anything about whether the blocking legislation enacted by later Congresses was effective to deny to themselves or to Executive Branch officials the adjustments committed to them by the 1989 Congress. Not every failure of Congress to live up to its commitments has a remedy in the courts. To the extent a Congressional commitment is not backed up by some legally-enforceable rule of law, such as that of contract law, *see, e.g., United States v. Winstar*, 518 U.S. 839 (1996), or, in the case of the federal judiciary, the constitutional

command of Article III, there may be no judicially cognizable remedy for the wrong.

What I would hold is that, once Congress put in place the 1989 Ethics Reform Act, with the intent and purpose of committing itself to this particular solution to its salary dilemma, in exchange for the prohibited activities specified in the Act, the Act must be construed as Congress intended it. Given the purpose and intent with which Congress acted in 1989, it is inconsistent with what Congress did to have later ad hoc enactments purport to provide otherwise. Article III of the Constitution provides protection for the judiciary against such arbitrary action.

Unlike my colleagues in the majority, I do not believe the Supreme Court intended to deny to Congress the power to make such commitments. This is not a case of the Judicial Branch commanding Congress to carry out an announced future intent, as was the case in *Will*. Rather it is a case of the courts enforcing the will of Congress, and recognizing Congress's purpose, that of fulfilling an obligation it chose to impose upon itself. Given that purpose, I can only conclude that the blocking acts passed in 1995, 1996, and 1997, as well as in 1999, violated the constitutional command of Article III, and were ineffective to deny the plaintiff judges and all members of the class the pay rate adjustments committed to them by the 1989 Act.

II. THE JURISDICTION QUESTION

The complaint was filed against the United States by the plaintiff judges in the District Court of the District of Columbia. The complaint alleged jurisdiction in the trial

court under the Little Tucker Act, 28 U.S.C. § 1346(a)(2), as well as under 28 U.S.C. § 1331, the general federal jurisdiction provision. After judgment was rendered by the trial court, the Government, faced with a judgment adverse to its position, took its appeal to this court.

The Little Tucker Act grants concurrent jurisdiction to district courts and the Court of Federal Claims over money claims against the United States "not exceeding $10,000 in amount." If a claim against the United States exceeds that amount, it may be brought only in the Court of Federal Claims, under the (non-little) Tucker Act, 28 U.S.C. § 1491. This court has exclusive appellate jurisdiction over judgments rendered under either act. 28 U.S.C. § 1295(a)(2), (3).

In its appeal, the Government concedes that the district court had jurisdiction under the Little Tucker Act over parts of the case, and hence this court would have appellate jurisdiction over those parts. Though not seeking reversal of the entire judgment on jurisdictional grounds, the Government raises questions regarding the jurisdictional consequences if the amounts claimed for any one judge, covering several years, are added together and treated as one claim.

Furthermore, if the case is thought to arise under the general jurisdiction provision of § 1331, and not under the Tucker Acts at all, an appeal from the case would go to the regional circuit court, in this case the Court of Appeals for the District of Columbia, and not to this court. However, neither the Government nor the plaintiff judges have challenged jurisdiction of the district court under the Little Tucker Act, or the appellate jurisdiction

of this court based on that Act. Since the Government took its appeal here, the Government necessarily accepts the theory that the core source for jurisdiction in the trial court was the Little Tucker Act.

The Government's concern focuses on the possible implications of basing the suit on that Act. The judges allege for the year 1995 that they were unlawfully deprived of the value of a cost-of-living increase for that year. The parties agree that the amount at issue per judge is about $2,500, and in any event well below the jurisdictional maximum of the Little Tucker Act. The Government notes, however, that the $2,500 allegedly owed for 1995 would also be unpaid in 1996, so that another $2,500 would be owed for that year and each year thereafter. If the annual amounts unpaid in 1995 and in each of the succeeding years are aggregated, with interest, the total at the time a final judgment is affirmed would exceed the $10,000 jurisdictional limit of the district court. The same analysis would have to be made for each of the other years at issue.

The Government, though not urging this view of the matter, suggests several possible remedies. One is to accept jurisdiction in the district court under the Little Tucker Act, but require the judges to waive any claim to aggregated amounts in excess of the $10,000 limit. Another is to permit the district court to transfer to the Court of Federal Claims those causes of action that involve aggregated amounts in excess of $10,000.

I appreciate the Government's attention to this matter. Fortunately I find the question readily resolved without resort to the Government's creative remedies.

I see no reason for aggregating the several causes of action alleged by the plaintiff judges. Each claim for damages for moneys wrongfully withheld in any given year for each claimant judge stands as a separate claim or cause of action. Thus the money alleged to be due the judge for 1995 is one claim. The alleged failure of the Government in 1996 to again make a payment due for that year is yet a separate cause of action. And so for each year thereafter. By like token, the alleged failure of the United States to pay a required adjustment first owed for 1996 (presumably in the same $2,500 range) creates a separate cause of action, different from that related to the 1995 causes of action, so that by the year 1999, for example, any one judge may have multiple causes of action applicable to that year's damages.

Though at first blush this may appear complicating, it is in fact a simpler and more straightforward treatment of the issue than the various perturbations that can be imagined under any theory of agglomeration. Furthermore, it is consistent with the approach this court took in the *Hatter* cases. The *Hatter* cases also involved a claim by judges that certain Congressional enactments had resulted in depriving them of money that was due them over a period of years. In *Hatter v. United States*, 185 F.3d 1356 (Fed. Cir. 1999) (*Hatter VII*), a panel of this court had accepted the Government's argument that, for jurisdictional purposes involving the application of the statute of limitations, we should treat each judge's claim as encompassing all moneys due such judge for the entire period of years involved.

On petition for rehearing en banc, brought by the plaintiff judges, the decision of the panel on this point

was reversed. *Hatter v. United States*, 203 F.3d 795 (Fed. Cir. 2000) (en banc) (*Hatter VIII*). The en banc court held that, under our governing precedent, in particular the case of *Friedman v. United States*, 159 Ct. Cl. 1 (1962), the claims should have been treated as stating a separate cause of action for each pay period, and the jurisdiction of the trial court with regard to whether individual causes of action were time barred should be determined accordingly. The analysis set out in *Friedman* applies with equal force here. It is the same analysis, and we are governed by the same precedent, that governed the en banc court's result in *Hatter VIII*. (I note that the Government did not have the benefit of the decision in *Hatter VIII* when it submitted its briefs in these cases.) It would be improper to treat the analogous question of the trial court's jurisdiction under the Little Tucker Act differently from the separate cause of action limitations theory enunciated in *Hatter VIII*.[23]

For purposes of this case, it is not necessary to decide whether the proper unit for determining the jurisdictional amount is the dollar amount allegedly due each judge each month, which is how judges are paid, and as it was

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[23] The Supreme Court has granted certiorari in *Hatter VIII*. *United States v. Hatter*, 121 S.Ct. 338 (2000) (No. 99-1978). In its petition for certiorari, the Government raised two questions: (1) whether *Evans v. Gore*, 253 U.S. 245 (1920), which this court treated as good law, remains such; and (2) whether general salary increases cancel a prior unconstitutional diminution. With regard to this court's application of the continuing claim doctrine, the issue here, the Government expressly declined to present the issue to the Court as a separate question for review. Pet. for Writ of Cert. at 29 n.27, *United States v. Hatter* (No. 99-1978). *Hatter VIII* remains controlling law on that issue.

understood in *Hatter VIII*, or whether it is the amount due each judge on an annual basis, as the discussion in the briefs has presented it. Either way, the amount for each cause of action is well below the Little Tucker Act limit. This treatment of the issue disposes of any question about the jurisdiction of the trial court over all of the claims, as well as any question regarding this court's jurisdiction to hear the appeal.

III. THE SECTION 140 ISSUE

As I stated at the beginning, I agree with the majority that Section 140 of Pub. L. 97-92 does not stand as a bar to the judges' suit. However, I believe that more needs to be said about it to explain why adequately.

The decision in *Will*, holding that two of the annual increases vested despite Congress' attempts to block them, did not meet with unanimous approval among certain Congressional officers. In the immediacy of the event, Senator Robert Dole responded to the Court's decision by attaching to a then-pending continuing appropriations resolution a one-paragraph statement that read, in relevant part:

> Notwithstanding any other provision of law or of this joint resolution, none of the funds appropriated by this joint resolution or by any other Act shall be obligated or expended to increase, after the date of enactment of this joint resolution, any salary of any Federal judge or Justice of the Supreme Court, except as may be specifically authorized by Act of Congress hereafter enacted . . . .

Beyond statements by Senator Dole made at the time, and which he later recanted (discussed below), there is no legislative history explaining the purpose of the provision beyond its text – the provision was not the product of any committee deliberation or recommendation, nor was it considered or debated by the Senate or the House.

Public Law 97-92, enacted December 15, 1981, to which Section 140 was attached, was a joint resolution providing for continuing appropriations for specified governmental units for fiscal year 1982. H.R.J. Res. 370, Pub. L. No. 97-92, 95 Stat. 1183 (1981). Under section 102(c) of Public Law 97-92, the "authority granted" by the resolution was available, unless otherwise provided in subsequent legislation, from December 15, 1981 until March 31, 1982. The March 31 termination date was later extended to September 30, 1982. H.R.J. Res., Pub. L. No. 97-161, 96 Stat. 22 (1982).

Because Section 140 seemed to single out the salaries of the judiciary for treatment different from that of all other federal employees, including Congress itself, it was not long after the appropriations resolution expired in September 1982 that the question arose as to the continuing vitality of the provision. As a general rule, "[s]ince an appropriation act is made for a particular fiscal year, the starting presumption is that everything contained in the act is effective only for the fiscal year covered." 1 United States General Accounting Office, *Principles of Federal Appropriations Law* 2-29 (2nd ed. 1991) [hereinafter *Principles*]. Thus rules of both the Senate and the House of Representatives prohibit 'legislating' in appropriations acts. *Id.* at 2-28.

Nevertheless, on occasion, when the "language used . . . or the nature of the provision makes it clear that Congress intended it to be permanent," the Comptroller General, the head of the General Accounting Office, has opined that a provision contained in an appropriations act should be considered permanent legislation, with continuing vitality even after the expiration of the appropriations bill itself. *See Principles* at 2-29 to 2-33.

By letter dated October 1, 1982, the Comptroller General advised the chairman of the House Committee on Appropriations that, in the Comptroller General's view, Section 140 should be considered to be permanent legislation. The Comptroller General stated that "[s]tanding alone, the language of Section 140 'by any other act * * * after the date of enactment of this resolution' is not persuasive as to permanency. However, the additional phrase 'except as may be specifically authorized by Act of Congress hereafter enacted' does lead us in that direction." Furthermore, the Comptroller General could not find any function for the provision unless it had continuing application after September 30, 1982, since the next regularly scheduled COLA would not take effect until October 1 of that year. From this, the Comptroller General reasoned that the provision must have been intended to have effect after the normal termination of the appropriations resolution.

Over the objections of the judiciary, this opinion was followed in subsequent opinions of the Comptroller General regarding salary increases for judges. See *Federal Judges*, 62 Comp. Gen. 54 (1982) [hereinafter *Federal Judges I*]; *Federal Judges II*, 62 Comp. Gen. 358 (1983); *Federal Judges III*, 63 Comp. Gen. 141 (1983). In one year the

Comptroller General concluded that Congress had provided the necessary "specifically authorized" act of Congress, *see Federal Judges II*; in other years not, *see Federal Judges I*; *Federal Judges III*.

In 1986, Circuit Judge Frank M. Coffin, then chairman of the Judicial Conference Committee on the Judicial Branch,[24] asked the Comptroller General to reexamine his position in light of new evidence regarding Congress's intent at the time of enactment of Section 140. The new evidence was a letter from Senator Dole, purporting to clarify his intent with respect to Section 140 when he introduced it as an amendment to the 1981 appropriations resolution. As the Comptroller General explained, Senator Dole's letter stated that the amendment was offered as an accommodation to another Senator; that it was prepared by that Senator's staff; and that the intent was to limit the application of the amendment to the fiscal year in which it was enacted. *Federal Judges IV*, 65 Comp. Gen. 352, 354. The letter further made reference to the Senate rule not to attach permanent legislation to continuing appropriations resolutions. *Id.* at 354.

The Comptroller General, however, declined to give weight to what he considered post-enactment legislative history, particularly when it appeared to him to conflict with earlier statements by the Senator. Thus, though recognizing that, as construed by the Comptroller General's earlier opinions, Section 140 extends beyond the problem Congress was presumably trying to cure, and that "it is

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[24] The Judicial Conference of the United States is the statutorily created body of federal judges that establishes policy for the administration of the Judicial Branch. *See* 28 U.S.C. § 331.

doubtful Congress intended to deny federal judges the same comparability increases provided to other federal employees," the Comptroller General felt compelled to adhere to his earlier position. *Id.* at 357.

With regard to the case before us, the Government reads Section 140 the same way as the Comptroller General, and adopts the same interpretive arguments in support of construing the provision as permanent legislation. Not surprisingly, the Government relies upon and cites with favor the Comptroller General's opinions in the matter. Further, the Government agrees with the Comptroller General regarding the usefulness of Senator Dole's later statements contained in his letter, arguing that they should be disregarded since they tell a court nothing about the intent that other legislators may have had in 1981. Legislative history, says the Government, does not include later attempts at explanations regarding which other legislators have no opportunity to consider and vote on. (But see *Am. Tel. & Tel. Co. v. United States*, 177 F.3d 1368, 1374-75 (Fed. Cir. 1999) (en banc), for a contrary position by the Government in which it successfully argued that the congressional record involving a 1988 act should be used to explain the meaning of a statute enacted a year earlier.)

The Government further notes that Congress has over the years since the enactment of Section 140 referred to that section when it passed legislation specifically authorizing COLAs for judges. The Government, citing to *Public Citizen, Inc. v. FAA*, 988 F.2d 186 (D.C. Cir. 1993), argues that by this periodic "reenactment" of Section 140, Congress is presumed to have adopted the administrative application of the statute, in this case the opinions of the

Comptroller General. Finally, the Government reiterates the point made by the Comptroller General, that Section 140 would appear to have no purpose if it did not have effect after September 30, 1982, since the next scheduled COLA would not take effect until the following day, October 1, 1982.

The plaintiff judges respond by arguing that the Comptroller General's opinions are not persuasive, particularly since they are internally inconsistent – this a reference to the Comptroller General's acknowledgment in *Federal Judges IV* that it is doubtful Congress intended the result called for by treating Section 140 as having continuing vitality. Plaintiffs argue that the fact that Congress from time to time passed legislation referencing Section 140 is of no consequence, as it merely reflects the fact that the Comptroller General has advised that it must. Plaintiffs further note that Section 140 is not wholly without purpose even if it is understood to expire along with the rest of the appropriations resolution: there was nothing to preclude Congress from enacting further legislation regarding federal employee salaries between December 30, 1981, and September 30, 1982, the life of the joint resolution. Had Congress done so, Section 140 would have applied to such further legislation.

I conclude that plaintiffs have the better of this argument. I begin with the established proposition, amply supported in the Comptroller General's *Principles* manual, that provisions contained in an appropriations act are intended to apply during the term of that act, and not thereafter. This is a presumption not easily rebutted, as it reflects a salutary canon of legislative interpretation upon which members of Congress may rely, and is supported

by affirmative rules of both Houses. Absent strong if not compelling evidence otherwise, legislators should not be held to have acquiesced in the enactment of new permanent legislation that they have no reason to anticipate or opportunity in which to participate.

If this is true for legislation generally, can it be less true when the legislation at issue affirmatively discriminates against one of the three co-equal branches of government? Furthermore, as noted by the Comptroller General in his 1982 opinion, *Federal Judges I*, construing this legislation as permanent has the effect of impliedly repealing portions of the 1975 Adjustment Act, which otherwise applies equally to employees of all three branches. As the Comptroller General himself points out, such implied repeals are disfavored, particularly when contained in appropriations acts. *Federal Judges I*, 62 Comp. Gen. at 57 (citing *Will*).

Furthermore, as the Comptroller General, and of necessity, the Government, recognized, the language of Section 140 is at best conflicting regarding whether it was intended as permanent legislation. The presumption that a provision in an appropriations act is not permanent may be overcome when the provision contains words of futurity indicating that Congress intended it to be permanent. *See Federal Judges I*, 56 Comp. Gen. at 62; *Principles* at 2-29. According to the guidelines set forth in Principles, the word "hereafter" is the most common word of futurity, but when used, as it is in Section 140, only in an exception clause ("except as may be specifically authorized by Act of Congress hereafter enacted"), it may not be sufficient to indicate permanency. *Principles* at 2-29. Furthermore, the words "or by any other Act" in Section

140 ("none of the funds appropriated by this joint resolution or by any other Act") are not words of futurity; they merely refer to any other appropriations act for the same fiscal year. *Id.* at 2-30. Similarly, the words "[n]otwithstanding any other provision of law," also present in Section 140, are not words of futurity. *Id.*

Under such circumstances, and in the absence of strong evidence to the contrary, the presumption against permanency is not rebutted. The statements by one senator, even if that senator was the sponsor (although it now seems he was not really the sponsor), whether made before, during, or after the legislative session, are of little value in determining what the entire Congress may have intended. Nor can I attach much significance to the fact that Congress in later years included references to Section 140 in appropriations acts when it wished to make clear that judges were included in particular COLA legislation. In face of the consistent and repeated advice of the Comptroller General's office, the drafters of the appropriations bills hardly could have done otherwise.

The Government, echoing the Comptroller General, places great stress on the idea that Section 140 would have no legal significance if it expired along with the rest of the appropriations resolution. That is simply a misreading of the law. It is true that the next regularly scheduled COLA for government employees, if there were to be one, would normally take effect at the beginning of the next fiscal year, October 1, 1982. However, it is also true that Congress could have decided to grant a catch-up COLA before then, anytime between the effective date of the resolution and its expiration date. As the plaintiffs note, had Congress chosen to do that, Section

140 would have applied to such a grant. Thus it is not correct to construe the situation as one in which the Section 140 provision would be entirely without meaning unless it is treated as permanent legislation. The question to be asked is, could the provision apply to COLAs that might have been enacted before October 1, as well as to those that may have been enacted thereafter. The answer is yes, and thus the provision cannot be said to have no possible purpose if held to expire at the end of the fiscal year.

On balance, and taking into consideration all of the facts set out in the record, I conclude that the presumption against treating Section 140 as permanent legislation is not rebutted sufficiently to impose that result on either the Congress or the courts. As a matter of law, Section 140 expired on September 30, 1982, when the appropriations resolution of which it was a part expired.

Plaintiffs have raised a further argument against treating Section 140 as having continuing viability: the enactment of the 1989 Ethics Reform Act impliedly repealed Section 140, since that section would be inconsistent with the automatic feature of the 1989 Act. And even if the 1989 Act did not repeal outright Section 140, at a minimum it serves to provide a continuing compliance with that provision's requirements. There is support in the legislative history of the 1989 Act for the plaintiffs' position. *See* 135 Cong. Rec. H29,498 (1989) (statement of Rep. Kastenmeier). And the majority opinion seems impressed with it.

In 1996, in response to an inquiry from Judge Barefoot Sanders, the then-chair of the Judicial Conference

Committee on the Judicial Branch, the Comptroller General opined that Section 140 was not repealed by implication by the 1989 Ethics Reform Act. See *Federal Judges V*, 1996 WL 97482 (Comp. Gen. Mar. 6, 1996). The Government, in its brief to this court, agrees with the Comptroller General, and further argues that, since Congress has specifically referred to Section 140 from time to time in its COLA appropriations, the 1989 Act should not be read as a blanket waiver absent specific words to that effect.

This additional set of issues, raised by the enactment of the 1989 Ethics Reform Act and its different approach to compensation for senior officials, further illustrates why a court should be reluctant to give indefinite life to Section 140, a spur-of-the-moment provision which received no consideration by the committees of Congress which would normally address such issues. Given my view that Section 140 does not have continuing vitality, I need not address these issues further.

CONCLUSION

Because (1) the district court had jurisdiction to hear these cases under the Little Tucker Act, and therefore this court has appellate jurisdiction; (2) the Supreme Court did not create a constitutional barrier to Congress's purpose in committing itself to COLAs under the 1989 Act; (3) the district court was correct in holding that the later arbitrary denials of the COLAs were unconstitutional diminutions in compensation; and (4) Section 140 does not stand as a bar to the judges' suit, the judgment of the District Court should be affirmed.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SPENCER WILLIAMS, et al.,	)	
Plaintiffs,	)	No. 97 CV 03106
vs.	)	The Honorable John Garrett Penn
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

ORDER CERTIFYING CLASS

This cause coming before the Court on Plaintiffs' Motion for Class Certification and the Court, having reviewed the allegations of Plaintiffs' Complaint and the Defendants' Answer thereto and the other stipulated and uncontested facts submitted in Plaintiffs' Statement of Material Facts As To Which There Is No Genuine Issue, THE COURT FINDS AND ORDERS AS FOLLOWS:

1. As to each count of the Complaint, the Class, which consists of more than one thousand persons is so numerous that joinder of all members before the Court is impracticable.

2. There are questions of law or fact common to the Class in each count. Specifically, each count seeks a declaration that certain public acts (described in paragraph 31 of each count) which withheld cost-of-living adjustments due all judges under the Ethics Reform Act (Pub. L. 101-194, 103 Stat. 1716) are unconstitutional.

3. The claims of plaintiffs in each count of the Complaint are typical of the claims of the Class.

4. The plaintiffs, with their counsel, will fairly and adequately protect and represent the interests of the Class in each count of the Complaint and that the interests of the representative parties are co-extensive with those of the Class.

5. As to each count of the Complaint, the party opposing the Class (the United States) has acted and has refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to each Class as a whole.

ACCORDINGLY, the Court determines that each count of the Complaint may be maintained as a class action, pursuant to Rule 23(b)(2), Fed. R. Civ. Proc. The Class in each count is defined as follows:

> *As to Count I:* All persons who served as Judges of the United States pursuant to Article III of the Constitution of the United States at any time during the period January 1 through December 31, 1995.

> *As to Count II:* All persons who served as Judges of the United States pursuant to Article III of the Constitution of the United States at any time during the period January 1 through December 31, 1996.

> *As to Count III:* All persons who served as Judges of the United States pursuant to Article III of the Constitution of the United States at

any time during the period January 1 through December 31, 1997.

ENTER: /s/ **John Garrett Penn**
District Judge

Aug. 20, 1998

Order Proposed by Plaintiffs

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SPENCER WILLIAMS,
et al.,

Plaintiffs,

v. **Civil Action No. 97-3106 (JGP)**

UNITED STATES OF AMERICA

Defendant

OPINION

The plaintiffs, twenty United States District Court judges appointed pursuant to Article III of the Constitution of the United States, filed this case as a class action seeking to have the Court declare that Section 140 of Pub.L. No. 97-92 (Section 140) does not operate to prevent the payment of Employment Cost Index (ECI) adjustments due federal judges under the Ethics Reform Act of 1989 (Pub.L. No. 101-194, 103 Stat. 1716) (now codified at 5 U.S.C. § 5318, note), sometimes hereinafter referred to as the "1989 Act," "because: (1) Section 140 expired on September 30, 1982; or (2) the provisions of Section 140 were superseded by the Ethics Reform Act of 1989 or, (3) the salary adjustments payable by operation of the Ethics Reform Act have been 'authorized by Act of Congress hereafter enacted' within the meaning of Section 140." Otherwise, the plaintiffs ask the Court to declare "that Section 140 is unconstitutional or void." The case is before the Court on plaintiffs' **Motion for Summary Judgment** and defendant's **Motion for Summary Judgment**. The parties agree that there are no genuine issues

of material fact. Fed.R.Civ.P. 56. The Court certified this case as a class action. *See* Fed.R.Civ.P. 23.

I

Article III, Section 1 of the Constitution provides, in pertinent part, that judges of the United States Courts "shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation which shall not be diminished during their Continuance in Office." (The Compensation Clause). The compensation of a federal district judge, appointed pursuant to Article III, is defined, in part, at 28 U.S.C. § 135, which provides in pertinent part: "Each judge of a district court of the United States shall receive a salary at an annual rate determined under Section 225 of the Federal Salary Act of 1967 (2 U.S.C. §§ 351-361) (Salary Act) as adjusted by" 28 U.S.C. § 461, of the Executive Salary Cost-of-Living Adjustment Act (Adjustment Act). The plaintiffs contend that the Adjustment Act, as amended by the Ethics Reform Act, requires that the salary of a federal judge be adjusted annually pursuant to an index set forth in the 1989 Act. The plaintiffs note that the adjustment is subject to one condition only, that there be in the same fiscal year an adjustment in the rates of pay of positions covered by the General Schedule determined under the Federal Pay Comparability Act of 1970, Pub.L. No. 91-656, 84 Stat.1946 (1971), codified at 5 U.S.C. 5305-5306 (Comparability Act). The Comparability Act is the mechanism for annually adjusting the rates of pay of most federal employees to reflect increases in the cost of living and salary increases in the private sector.

In the Ethics Reform Act, Congress revised the pay system for high-ranking government officials, including federal judges. The Act changed the method by which the salary of federal judges would be periodically reviewed by the Commission, imposed severe limitations on the outside income judges can earn, forbade receipt of honorariums and provided a new mechanism for annual adjustments to judges' pay. The Ethics Reform Act provided that each judge would receive a base salary increase, effective January 1, 1991. Relevant to the contentions of the plaintiffs, the Act provided that, beginning in 1991 and in each subsequent year, the salary of a federal judge shall be adjusted based upon a specific schedule and index. Under the Act, in any year in which salaries of General Schedule employees are adjusted under the Comparability Act, federal judges' salaries are to be adjusted by an amount equal to one-half of one percent less than the percentage change in the ECI for the period ended December of the previous year. Ethics Reform Act, § 704(a)(1)(B). The statute also provides a five percent cap on any adjustment per year. Thus, according to the plaintiffs, the law makes the ECI adjustment automatic, the only condition being that there must be an adjustment in the rates of pay for General Schedule employees in the same year. Absent an adjustment for General Schedule employees, there is no adjustment for the judges.

The federal judges' salaries were adjusted pursuant to the Ethics Reform Act on the first day of January 1991, 1992 and 1993. In 1994, there was no adjustment for General Schedule employees and as a result no adjustment for the judges. There were ECI adjustments for General Schedule employees in 1995, 1996 and 1997, but

no ECI adjustment or COLA for the federal judges in those years. It is the latter years and future compensation that are the subject of this case. As argued by the defendant, the failure of the federal judges to receive ECI adjustments for those years resulted from the fact that Congress, acting pursuant to Section 140, did not vote an ECI adjustment for federal judges in those years.

II

Before addressing the merits of this litigation, the Court will address whether it is necessary for this Court to recuse itself from consideration of this case. This matter is addressed in view of the defendant's "Suggestion of Designation and Temporary Assignment of District Judge Who Took office on or After January 1, 1998, to Hear and Decide This Case." The Court hastens to note that the defendant has not requested the Court to recuse itself; rather, it suggested that the assignment to a federal judge appointed after the complaint was filed and one who was not a sitting Article III judge during 1995, 1996 or 1997 might raise less of an issue of an appearance of conflict. The plaintiffs opposed the Suggestion and the Court concluded that there is no impediment to the Court retaining this case.

There is no Article III federal judge who does not have an interest in the case. This includes judges appointed before and after December 31, 1997. Thus, any decision in this case will affect the compensation of every Article III judge.

A similar issue was addressed in *United States v. Will*, 449 U.S. 200, 101 S.Ct. 471, 66 L.Ed.2d 392 (1980), a case

which both sides to the controversy contend dictates the decision the Court must reach on the merits in this case. Like this case, *Will* involved a question as to whether Article III judges should have received a cost-of-living increase during four years in question. The Supreme Court concluded that the federal judges were entitled to the cost-of-living adjustment for two of the four years. More important on the limited issue relating to disqualification or recusal, the Supreme Court concluded that neither the District Court judge in *Will* nor any Justice of the Supreme Court was required to be disqualified though both the District Judge and the Justices of the Supreme Court could be said to have an interest in the outcome of the case. In so holding, the Supreme Court recognized the continuing validity of the Rule of Necessity. It noted that the rule "had its genesis at least five and a half centuries ago." 449 U.S. at 213, 101 S.Ct. at 480. Second, the Supreme Court concluded that 28 U.S.C. § 455 (relating to disqualification of a judicial officer) "was to deal with the reality of a positive disqualification by reason of an interest or the appearance or possible bias." 449 U.S. at 216, 101 S.Ct. at 481. It was "not intended by Congress to alter the time-honored Rule of Necessity." 449 U.S. at 217, 101 S.Ct. at 482. The Supreme Court went on to state that "we would not casually infer that the Legislative and Executive Branches sought by the enactment of § 455 to foreclose federal courts from exercising 'the province and duty of the judicial department to say what the law is.' " 449 U.S. at 217, 101 S.Ct. at 482 (citing to *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803)).

This Court is not required to recuse itself is this case. Nor is this Court disqualified from hearing this case. The case cannot be transferred to any Article III judge who does not have an interest in the outcome of the case simply because it affects every Article III judge. The Court concludes that, pursuant to the Rule of Necessity, this Court can hear and decide this case.

III

Any discussion relating to the compensation of Article III federal judges must begin with consideration of the comments and words of the Founding Fathers of this great nation. As the Supreme Court noted in *Will*, "[t]he Compensation Clause has its roots in the long standing Anglo-American tradition of an independent Judiciary." 449 U.S. at 217, 101 S.Ct. at 482. "A Judiciary free from control by the Executive and the Legislative is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government." 449 U.S. at 217-218, 101 S.Ct. at 482. This view can been traced to our Founding Fathers who were very aware of the importance of an independent judiciary. In Federalist No. 79, Hamilton stated that "[n]ext to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support." He noted that "[i]n the general course of human nature, a power over a man's subsistence amounts to a power over his will. And we can never hope to see realized in practice, the complete separation of the judicial from the legislative power, in any system which leaves the former dependent for pecuniary resources on the occasional grants of the latter." Hamilton observed

that "the salaries for judicial officers may from time to time be altered, as occasion shall require, yet so as never to lessen the allowance with which any particular judge comes into office in respect to him." He even noted the distinction between a salary paid to the President, as opposed to that paid to a judge. He observed that since the President is elected "for a term of no more than four years, it can rarely happen that an adequate salary, fixed at the commencement of that period, will not continue to be such to its end." But for judges appointed to serve for life, "it will happen, especially in the early stages of government, that a stipend, which would be very sufficient at their first appointment, would become too small in the progress of their service."

In *Will*, the Supreme Court traced the laws protecting the compensation of judges in English history and in the history of this nation. 449 U.S. at 217-221, 101 S.Ct. at 482-483. As the Supreme Court observed, Madison's notes on the Constitutional Convention reveal that at one point there was a tentative arrangement under which Congress could neither increase nor decrease the compensation of judges. But Gouvernour Morris was successful in striking the prohibition on increases. 449 U.S. at 219, 101 S.Ct. at 483. It appears that Madison's support for Congress not having the power to decrease or increase the compensation of sitting judges grew out of a concern that in either case, judges would be inclined to defer to Congress. Morris' argument prevailed before the Constitutional Convention.

The Supreme Court quoted a significant portion of The Federalist No. 79, as follows:

> It will readily be understood, that the fluctuations in the value of money, and in the state of society, rendered a fixed rate of compensation [of judges] in the Constitution inadmissible. *What might be extravagant to-day might in half a century become penurious and inadequate. It was therefore necessary to leave it to the discretion of the legislature to vary its provisions in conformity to the variations in circumstances; yet under such restrictions as to put it out of power of that body to change the condition of the individual for the worse.*

449 U.S. at 220, 101 S.Ct. at 483 (emphasis this Court's).

The Supreme Court recognized yet another purpose of the Compensation Clause. It stated:

> This Court has recognized that the Compensation Clause also serves another, related purpose. *As well as promoting judicial independence, it ensures a prospective judge that, in abandoning private practice-more often than not more lucrative than the bench-the compensation of the new post will not diminish.* Beyond doubt, such assurance has served to attract able lawyers to the bench and thereby enhances the quality of justice.

449 U.S. at 220-221, 101 S.Ct. at 483 (citations omitted, emphasis this Court's). The Supreme Court echoed a similar sentiment 79 years ago in yet another case which related to the passage of the 16th Amendment which provided for a federal income tax. *Evans v. Gore*, 253 U.S. 245, 40 S.Ct. 550, 64 L.Ed. 887 (1920). The plaintiff, Judge Evans, was a United States District Judge and was serving in that capacity when the new income tax law was enacted. He contended that in imposing the new income tax on him, Congress had diminished his pay in violation

of the Compensation Clause. The Supreme Court agreed and held that the tax as imposed on a sitting Article III judge was invalid. The Supreme Court stated:

> [T]he primary purpose of the prohibition against diminution was not to benefit the judges, but, like the clause in respect of tenure, to attract good and competent men [and women] to the bench and to promote that independence of action and judgment which is essential to the maintenance of the guaranties, limitations, and pervading principles of the Constitution and to the administration of justice without respect to persons and with equal concern for the poor and the rich. Such being its purpose, it is to be construed, not as a private grant, but as a limitation imposed in the public interest; in other words, not restrictively, but in accord with its spirit and the principle on which it proceeds.
>
> *Obviously, diminution may be effected in more ways than one. Some may be direct and others indirect, or even evasive as Mr. Hamilton suggested. But all which by their necessary operation and effect withhold or take from the judge a part of that which has been promised by law for his services must be regarded as within the prohibition. Nothing short of this will give full effect to its spirit and principle.*

253 U.S. at 253-54, 40 S.Ct. at 553 (emphasis this Court's).

There is no doubt but that those words based on experience and sound judgment over the centuries and the words written and uttered by the Founding Fathers are just as relevant and important today as they were at the dawn of this nation. It was the Founding Fathers' understanding of the need for an independent judiciary

which led them to include within the Constitution, Article III, § 1, which provides:

> The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, *which shall not be diminished during their Continuance in Office.* (Emphasis this Court's).

The Founding Fathers were obviously very concerned about creating and maintaining an independent judiciary. This apparently led Madison to feel that allowing Congress to make any adjustment in judges' pay, up or down, could have a serious impact on that independence. His view did not prevail because the result would have been the opposite of what he intended. There is a suggestion that Madison thought of tying judicial salaries to the price of a commodity so that when that price rose, the judges' income would rise as well. 449 U.S. at 220, n. 22, 101 S.Ct. at 483, n. 22. He commented that: "The variations in the value of money, may be guarded agst. by taking for a standard wheat or some other thing of permanent value." 449 U.S. at 220, 101 S.Ct. at 483 (citation omitted). The Supreme Court noted that "Morris criticized the proposal for overlooking changes in the state of the economy; the value of wheat may change, he said, and leave the judges undercompensated." *Id.* We are told that the Founders may have rejected that plan due to an unsatisfactory experience with a similar plan in Virginia relating to payment for members of the clergy. 449 U.S. at 220, n. 22, 101 S.Ct. at 483, n. 22. But, in any event, the Founding Fathers, like our modern day Congress, grappled to find a method for providing fair compensation to

judges and a method for addressing any increases in the cost of living. Indeed, Madison's suggestion that wheat be used as a measure was, no doubt, an early attempt to provide automatic cost-of-living adjustments.

One modern attempt to address that concern was the Adjustment Act. Under that Act, the judges were to receive the same annual percentage adjustment as the annual adjustment made in the General Schedule under the Comparability Act. The Comparability Act delegated to the President the power to set the salary adjustment for General Schedule employees, either by submitting an order and report based on recommendations of an agent or by submitting an Alternative Plan. The Alternative Plan was to be filed prior to September 1 of each year. In fact, the President submitted an Alternative Plan every year. That plan then became law unless vetoed by either House of Congress within thirty days. Until the Congress and the President acted on the legislation to repeal or allow an adjustment, there was no final law in place to adjust salaries. This was the state of the law in 1980 addressed by the Supreme Court in *Will.* In Year One, relating to adjustments for Fiscal Year 1977, the Supreme Court held that since the Congressional statute which would have repealed the adjustment was not signed until October 1, it effectively would have diminished the compensation of federal judges since the COLA under the Adjustment Act was effective midnight of September 30. 449 U.S. at 224-226, 101 S.Ct. at 485-486. For Fiscal Years 1978 (Year 2) and 1979 (Year 3), the President signed the repealing statutes prior to October 1 of each year, and thus the adjustments did not vest. 449 U.S. at 226-229, 101 S.Ct. at 486-487. Finally, with respect to Year 4, Fiscal Year

1980, the President did not sign the repealing legislation until after October 1, thus the adjustment vested.

It is clear that the pay legislation addressed by the Supreme Court in *Will* did not vest until such time as the President acted by signing or not signing the repealing statute on or before September 30 of a given year. Although Congress had set up a mechanism to address the issue of yearly salary adjustments under that legislation, the President had until September 30 to accept or reject the proposed adjustment. Therefore, up until September 30 of a given year, it was not clear whether there would be an adjustment or the amount of any adjustment.

The Ethics Reform Act differs substantially from the provisions discussed above. *See Boehner v. Anderson*, 308 U.S.App.D.C. 94, 96, 30 F.3d 156, 158 (1994). First, the Act imposes severe limitations on the outside income federal judges may earn, forbid the receipt of honorariums and imposes mandatory work loads on senior judges. Second, the new Act revised the process for providing annual cost-of-living adjustments for federal judges. The trigger occurs when there is an adjustment in the General Schedule salaries, then the judges are to receive an adjustment as well. Perhaps the most significant change was that Congress took control and prescribed the means for determining the annual pay adjustment. The Ethics Reform Act provides that starting in 1991, federal judges' salaries are to be adjusted annually based on the Employment Cost Index, or ECI. The ECI is a quarterly index of wages and salaries for private industry workers published by the Bureau of Labor Statistics. Finally, the Ethics Reform Act set a cap on the amount of any cost-of-living

adjustment for judges; no increase can exceed five percent.

The Bipartisan Task Force on Ethics which was appointed by Congress found that failure to implement cost-of-living adjustments was "the single most important explanation for the growing disparity between top salaries in government and the private sector, and the 38% loss of purchasing power by these officials [Executive Schedule positions] since 1969." 135 Cong.-Rec. H9265 (daily ed. Nov. 21, 1989). The Task Force recommended that the ECI, minus one-half a percent (0.5%), be used. *Id.* Pursuant to the Ethics Reform Act, adjustments were made to judges' compensation in 1991, 1992 and 1993, since in each of those years there were adjustments to the General Schedule salaries. In 1994 there was no adjustment to the General Schedule salaries, and therefore, the ECI adjustment for federal judges was not triggered under the 1989 Act. The Ethics Reform Act appeared to work well since such adjustments were automatic, and required no action by the President or the Congress. Moreover, the adjustments were non-political and fair in the sense that they were based on the ECI. However, for Fiscal Years 1995, 1996 and 1997, although the General Schedule employees received adjustments based on the ECI, the judges' pay was not adjusted because Congress adopted and the President signed resolutions which purported to withhold the scheduled adjustments which were provided for federal judges under the Ethics Reform Act. There is no factual dispute as to the trigger, that is whether an adjustment in the General Schedule took effect for each of those years; it did.

As the Court noted, there is a substantial difference between the mechanism under the prior Act and the Ethics Reform Act. By its terms, as held by the Supreme Court in *Will*, the adjustments under the prior Act did not take effect until such time as the President acted or failed to act on any repealing legislation on or before September 30. Thus, clearly any increase in compensation by virtue of the adjustment did not vest until October 1.

The Bipartisan Task Force appointed by Congress quoted from the findings of the President's Commission on Executive, Legislative and Judicial Salaries in its report, "Fairness for our Public Servants."

> The Commission goes on to observe that while private sector wages have more than kept pace with inflation over the last two decades, the levels of salaries of senior officials in all three branches is about 65-70% in constant dollars of what their 1969 salaries were for the same positions. As a result, Federal Judges are resigning at a higher rate than ever before.

135 Cong. Rec. H9264 (daily ed. Nov. 21, 1989). This was a concern referred to in *Will*. 449 U.S. at 221, 101 S.Ct. at 483. The Task Force found that the system then in place for adjusting the salaries of Executive Level positions and federal judges did not work. The Task Force noted:

> The current system of tying senior salaries to the same percentage increase as those of other Federal workers has only reopened to political gamesmanship what was intended to be a more objective and automatic cost-of-living adjustment (COLA).

Id. It cannot be overlooked that the concerns expressed by the Task Force are the same as those expressed by the Founding Fathers over two hundred years ago. The findings of the Task Force contributed to the enactment of the Ethics Reform Act of 1989.

The plaintiffs contend that the "1989 Congress specified the future salary of judges by adopting the ECI index." The defendant argues that the Ethics Reform Act did no more than to create a formula not unlike the formula provided in the Act considered by the Supreme Court in *Will*. Moreover, the defendant argues that when Congress set out a mechanism for payment in future years, that alone is evidence that Congress has created nothing more than a formula.

In *United States v. More*, 7 U.S. 159, 3 Cranch 159, 2 L.Ed. 397 (C.C. D.C. 1803), Congress had enacted a system of fees for compensating justices of the peace, however, Congress thereafter abolished the fees. Justice of the Peace More continued to collect the fees and the government brought an indictment against him. The Circuit Court for the District of Columbia with presiding Justice, Chief Justice John Marshall, held that the salary in question was subject to the Compensation Clause. The Supreme Court in *Will* referred to *More* and noted that its decision with respect to Year 2 in *Will*, relating to Fiscal Year 1978, in which it held that the 1975 Adjustment Act increase had not vested before it was repealed, was not contrary to the decision in *More*. The Supreme Court stated that "[i]n *More*, the fee system was already in place as part of the justices' compensation when Congress repealed it. Here [in *Will*], by contrast, the increase in Year 2 *had not yet become part of the compensation of Article*

III judges when the statute repealing it was passed and signed by the President." 449 U.S. at 228, n. 32, 101 S.Ct. at 487, n. 32 (emphasis this Court's). The fee schedule in *More* was a system of fees for compensating justices of the peace. Although Congress provided for a fee schedule, it apparently could not set the specific amount of fees the justices of the peace would be paid. The distinction between *More* and *Will* is that the Year 2 increase in *Will* had not vested while the compensation plan based on fees to be earned in *More* had vested.

The Court concludes that the compensation plan under the Ethics Reform Act is similar to the fee schedule plan in *More*, except that the Ethics Reform Act is much more precise and definite. The 1989 Congress provides for the payment of cost-of-living increases to judges when General Schedule employees received such adjustments. The increases, if any, vested on the date of the enactment of the statute conditioned only on adjustments being granted to General Schedule employees. That plan is clearly distinguishable from that found in the earlier Act where the *Will* court found that vesting did not take place until October 1.

The defendant argues that in *Will* the Supreme Court held that a salary increase vests only when it takes effect. The defendant cites to the following language in *Will:*

> To say that the Congress could not alter a method of calculating salaries before it was executed would mean the Judicial Branch could command Congress to carry out an announced future intent as to a decision the Constitution vests exclusively in the Congress. *We therefore conclude that a salary increase vests for the purpose*

> *of the Compensation Clause only when it takes effect as part of the compensation due and payable to Article III judges.* With regard to Year 2, we hold that the Compensation Clause did not prohibit Congress from repealing the planned *but not yet effective cost-of-living adjustment of October 1, 1977, when it did so before October 1, the time it was first scheduled to become part of judges compensation.* The statute in Year 2 thus represents a constitutionally valid exercise of legislative authority.

449 U.S. at 228-229, 101 S.Ct. at 487 (footnote omitted, emphasis this Court's). The key is that the adjustment vests "when it takes effect as part of the compensation due and payable to Article III judges"; not when the judge actually begins to receive the benefits of that adjustment. That was also the key in *More.*

The Supreme Court held in *Will* that Congress was not prohibited "from repealing *the planned but not yet effective* cost-of-living adjustment." *Id.* As this Court noted earlier, it is clear that in *Will*, an adjustment only became effective after September 30, and up until that time, a proposed adjustment could be repealed. Here, the situation is similar to *More.* Congress has not merely established a formula; rather, it has provided that in the future, beginning with 1991, cost-of-living adjustments will be paid to federal judges, provided such adjustments are made to General Schedule employees. Unlike the earlier law, the Ethics Reform Act did not provide for later action by the Congress and the President before the adjustment becomes effective. Here, the adjustment provided under the Ethics Reform Act is part of the judges' compensation.

A decision holding that the adjustment vested upon the enactment of the Ethics Reform Act finds support in *Boehner v. Anderson, supra.* That case involved the 1989 Act. Congressman Boehner filed an action alleging that the COLA provision of the 1989 Act violated the 27th Amendment to the Constitution which provides that no law "varying the compensation [of Members of Congress] shall take effect until an election of Representatives shall have intervened." Mr. Boenher [sic] argued that each COLA took effect in the year it was payable, thus he contended that each COLA varied the compensation during the *current* term. In short, he argued that the Ethics Reform Act did not vary the Members' pay, rather, the pay was varied at the time of an annual adjustments and therefore each annual adjustment is a law varying the compensation of Members of Congress and occurs during the Members' current term. This would violate the 27th Amendment. The defendants in that case argued that each new adjustment was not a new law varying pay because the COLA provisions of the 1989 Act were in place in 1989. The Court of Appeals agreed with the defendants and held that the entitlement to a COLA became law upon the passage of the Ethics Reform Act. The court stated:

> For example, the COLA provision became law in 1989 but the first COLA would not be made until more than a year later, on January 1, 1991 – pursuant to the Congress's decision, prior to but in the spirit of the Madison amendment [27th Amendment], to defer implementation of the COLA until after the 1990 congressional election. See Ethics Reform Act, § 704(b) (codified at 5 U.S.C. § 5318 note) (COLA provisions "shall take effect on January 1, 1991"). We see no reason whatsoever why the Congress cannot, for convenience, instead specify an index or formula with the same effect.
>
> In sum, *it has been the law since 1989 that a COLA would be made on January 1, 1991 and each year thereafter pursuant to a specified formula.*

308 U.S.App.D.C. at 100, 30 F.3d at 162 (emphasis this Court's).

This Court concludes that history, precedent and the law can lead to only one result. The Ethics Reform Act granted federal judges a COLA or ECI adjustment, effective at the time of the enactment of the Act in 1989. Pursuant to the Ethics Reform Act, federal judges are entitled to receive what the 1989 Act gave them; ECI adjustments for the years 1995, 1996 and 1997. Those adjustments vested when the 1989 Act was enacted, subject only to the condition that an ECI adjustment be made for General Schedule employees. In each of those years, General Schedule employees received an ECI adjustment. The Supreme Court held that "a salary increase 'vests' for the purpose of the Compensation Clause only when it takes effect as part of the compensation due and payable to Article III judges." 449 U.S. at 228-229, 101 S.Ct. at 487. Here the ECI adjustments became part of the judges' compensation due and payable to the judges when the Ethics Reform Act became law. "The Ethic Reform Act became law on November 30, 1989 when, the bill having passed both Houses and been presented to President Bush, he signed it into law. The provision calling for an annual COLA is part of that 1989 law." *Boehner*, 308 U.S.App.D.C. at 99, 30 F.3d at 156 (citations omitted).

The Court concludes then that the Ethics Reform Act requires that the federal judges receive the ECI adjustments in any year when the General Schedule employees receive such adjustments. That includes 1995, 1996 and 1997, as well as any future years.

IV

The Ethics Reform Act would appear to dispose of this matter, however, the defendant argues that pursuant to Section 140, no COLA for federal judges can take effect without being specifically authorized by Congress. In other words, defendant contends that an adjustment for federal judges is not automatic; rather, it requires affirmative action by Congress. Interestingly enough, Section 140, Pub.L. 97-92, was adopted even prior to the enactment of the 1989 Act. Section 140 provides:

> Notwithstanding any other provision of law or of this joint resolution, none of the funds appropriated by this joint resolution or by any other Act shall be obligated or expended to increase, after the date of enactment of this joint resolution, any salary of any Federal judge or Justice of the Supreme Court, except as may be specifically authorized by Act of Congress hereafter enacted: *Provided*, That nothing in this limitation shall be construed to reduce any salary which may be in effect at the time of enactment of this joint resolution nor shall this limitation be construed in any manner to reduce the salary of any Federal judge or any Justice of the Supreme Court. Pub.L. 97-92, § 140, 95 Stat. 1182, 1200 (1982) (emphasis in the original).

Section 140 was originally scheduled to expire on March 31, 1982, *see* Pub.L. 97-92, § 102, but was extended to September 30, 1982, pursuant to Pub.L. 97-161, 96 Stat. 22 (March 31, 1982). There is no legislative history relating to Section 140 except for statements by Senator Robert Dole in offering the amendment.

The Comptroller General has consistently interpreted Section 140 as barring the payment of automatic adjustments to judges in subsequent years, including ECI adjustments payable under the Ethics Reform Act. The defendant relies, in part, upon that interpretation. In response to the argument of the defendant, the plaintiffs contend that (1) Section 140 was not permanent legislation or, (2) even if it was permanent legislation, Section 140 has been superseded by the Ethics Reform Act, or (3) the adjustments provided for under the 1989 Act have been approved by Congress and thus comply with Section 140 or, (4) to the extent that Section 140 would otherwise bar ECI or COLA adjustments, under the 1989 Act, Section 140 is unconstitutional.

Shortly after Section 140 was passed, the Comptroller General responded to a letter from the Honorable Jamie L. Whitten, Chairman of the Committee on Appropriations. Letter dated October 1, 1982, Plaintiffs' Motion Exhibit I. The Comptroller General stated:

> That provision [Section 140] was introduced for the stated purpose of precluding the annual cost-of-living increase which a Federal judge of Justice of the Supreme Court would otherwise receive on October 1 of any year in which a cost-

> of-living salary adjustment is made to the General Schedule under 5 U.S.C. § 5305. Congressional Record, Senate S13373, November 13, 1981. *Absent section 140, the adjustment for Federal judges and Justices of the Supreme Court is mandated by law* (emphasis this Court's).

In discussing whether Section 140 constitutes permanent legislation, the Comptroller General noted:

> We have held that a provision contained in an annual appropriation act may not be construed to be permanent legislation unless the language used therein or the nature of the provision renders it clear that such was the intent of Congress. We believe that the language of section 140 when construed together with the nature of the provision results in a clear showing of a congressional intent to enact permanent legislation.
>
> Standing alone, the language of section 140 "by any other act * * * after the date of the enactment of this resolution" is not persuasive as to permanency. However, the additional phrase "except as may be specifically authorized by Act of Congress hereafter enacted" does lead us in that direction. Moreover, to view section 140 as not being permanent legislation would strip the section of any legal effect.

The Comptroller General went on to note that Section 140 was included in a continuing resolution which was enacted on December 15, 1981 and which expired on September 30, 1982, while the next cost-of-living adjustment was to be effective October 1, 1982. He then stated that "if section 140 were not to be held permanent legislation, the section would have no legal effect since it would

have been enacted to prevent increases during a period when no increases were authorized to be made."

On November 23, 1982, the Comptroller General had a second opportunity to address Section 140 when the Director of the Administrative Office of the United States Courts asked him to reconsider the conclusion he reached in his October 1 letter. The Comptroller General responded:

> As we stated in our opinion letter of October 1, 1982, we have held that a provision contained in an annual appropriations act may not be construed to be permanent legislation unless the language or the nature of the provision makes it clear that such was the intent of Congress. Usually, when the word "hereafter" or other words indicating futurity are used, or when the provision is of a general character bearing no relation to the object of the appropriation, the provision may be construed as permanent legislation. Section 140 of public Law 97-92, quoted above, contains such words of futurity, and the provision bears no direct relation to the object of the appropriation act in which it appeared, a continuing appropriations act for fiscal year 1982. Thus we conclude that section 140 is permanent legislation.

62 Comp. Gen. 54, Plaintiffs' Motion Exhibit J. The Comptroller General reached similar conclusions in 1983. 62 Comp. Gen. 358, 63 Comp. Gen. 141, Plaintiffs' Motion Exhibits K and L. In 1986, the Comptroller General responded to a letter from Judge Frank M. Coffin in which Judge Coffin noted that in a discussion during a

hearing in 1982, "Senator Dole [a sponsor of Section 140] stated that the amendment (section 140) would be in effect for only 1 year." Plaintiffs' Motion Exhibit M. Judge Coffin contended that this statement by Senator Dole helped identify the legislative intent behind Section 140. Indeed, the Comptroller General noted that he had received a letter from Senator Dole on March 18, 1985 in which Senator Dole stated that "the intent was to limit the application of this amendment [Section 140] to the fiscal year in which it was enacted, and he points out that the Senate rule and practice is not to attach permanent legislation to continuing resolution." However, the Comptroller General noted that at the time Senator Dole introduced section 140 he stated that the purpose was "to put an end to the automatic backdoor pay raises for federal judges." Noting this "conflict" in Senator Dole's remarks, the Comptroller General affirmed his prior decisions. 65 Comp. Gen. 352, Plaintiffs' Motion Exhibit M. Finally, the Comptroller General noted that "it is doubtful Congress intended to deny federal judges the same comparability increases provided to other federal employees." *Id.*

The Court does not find the decision of the Comptroller General to be persuasive. The Court concludes that Section 140 was not permanent legislation. The Comptroller General's reasoning that Section 140 would have no legal effect if it was not permanent legislation, does not necessarily follow since Section 140 could have been amended or changed by Congress between December 15, 1981 and September 30, 1982. Thus, a holding that Section 140 was not permanent legislation would not have "strip[ped] the section of any legal effect."

The Court also notes that Section 140 does not mention either the Adjustment Act or the Salary Act. The Supreme Court held that:

> As a general rule, "repeals by implication are not favored." This rule applies with especial force when the provision advanced as the repealing measure was enacted in an appropriations bill. Indeed, the rules of both Houses limit the ability to change substantive law through appropriations measures.

United States v. Will, 449 U.S. at 221-222, 101 S.Ct. at 484 (citations omitted). *See also Tennessee Valley Authority v. Hill*, 437 U.S. 153, 189, 98 S.Ct. 2279, 2299, 57 L.Ed.2d 117 (1978). The Court concludes that Section 140 did not repeal the earlier Acts.

The Court further concludes that Section 140 was not permanent legislation and that it expired no later than September 30, 1982 and thus does not affect legislation which was passed after that date. Moreover, the Court notes that even the Comptroller General found it doubtful that Congress intended to deny federal judges the pay adjustments given to other federal employees. These factors, together with the presumption against repeals by implication, the rules against using an appropriation measure to amend substantive legislation and the rule that an appropriation measure expires when the appropriation it authorized expires, all weigh against the interpretation given Section 140 by the Comptroller General and against the argument relating to Section 140 made by the defendant. All of this convinces this Court that Congress did not deliberately ignore the Compensation Clause or deliberately decide to deprive the federal

judges of pay adjustments afforded all other federal employees. For this reason and for the reasons stated in Part III, *supra*, the plaintiffs are entitled to prevail in this lawsuit.

V

Although the Court has determined that Section 140 did not repeal the earlier Acts and has no force or effect on subsequent legislation and that ruling should dispose of this case, there is another reason why the plaintiffs prevail in this case. Even if one accepts the defendant's argument that Section 140 was permanent legislation, which this Court does not, when Congress enacted the Ethics Reform Act, that Act superseded Section 140. The defendant, adopting the position of the Comptroller General, argues that because of Section 140, Congress was required to take affirmative action in order to give the federal judges the benefit of ECI adjustments. Assuming that the defendant is correct, Congress took such affirmative action when it enacted the Ethics Reform Act in 1989. As noted above, Part III, *supra*, the Ethics Reform Act made substantial changes respecting the compensation of federal judges. Congress did not merely change the formula for determining compensation, it provided that federal judges were not entitled to receive honorariums and it limited other outside income. This Court has no knowledge as to the number of judges who may have received honorariums or outside income, but to the extent any did, their potential outside income has now been reduced by the Ethics Reform Act. It seems reasonable to assume that Congress must have factored this into the equation when it addressed the future compensation of judges. With

respect to senior federal judges, the Congress required that they perform a minimum level of service in order to be certified by the Chief Justice, in the case of Justices of the Supreme Court, and by the Chief Judge of the Circuit, in the case of Circuit and District Judges. Congress did more. It enacted a pay raise for Executive and Legislative senior officials and federal judges bringing those officials closer in pay to their civilian counterparts. Ethics Reform Act, § 703. Last in this regard, Congress established a formula for determining the rate of any pay adjustment by tying any increase to the Employment Cost Index or ECI. Ethics Reform Act, § 704. Thus, when Congress enacted the Ethics Reform Act, it did not merely change a formula, it made a number of changes and it set in place a mechanism which provides for future cost-of-living adjustments without any affirmative action by Congress or the President.

Congress did reference Section 140 in the 1989 Act. It provided under a clause entitled "Specific Authority" that "[f]or the purposes of [Section 140], appropriate salary increases are hereby authorized for Federal judges and Justices of the Supreme Court pursuant to subsection (a)." Ethics Reform Act, § 702(c).

There were substantial changes relating to the payment of federal judges under the Ethics Reform Act. *The Act provided for ECI adjustments as part of the compensation of federal judges.* Moreover, while under the old Act a pay adjustment did not vest until October 1 of a given year, the Ethics Reform Act became effective on the date of its enactment and provided for annual adjustments to judges' salary, conditioned only on an ECI adjustment being made for employees on the General Schedule. The

Employment Cost Index determines the rate of any adjustment, and if such an adjustment is approved for those on the General Schedule, there is an *automatic* adjustment for members of the federal judiciary. Neither the Congress nor the President is required to take any other action, unlike in the case of the earlier Acts where the Congress and the President could take action to deprive the judges of a cost-of-living adjustment on or before September 30.

Assuming, as this Court does not, that Section 140 was permanent legislation, Congress enacted the Ethics Reform Act under "specific authority" for the purposes of Section 140. The defendant argues that the reference to Section 140 suggests that Congress considered and still considers Section 140 to be viable. This Court disagrees. Rather, in view of past opinions by the Comptroller General holding that Section 140 required affirmative action by Congress in increasing or adjusting judges' pay, the reference to Section 140 appears to have been inserted, not as a means of continuing the viability of Section 140, but to make certain that the federal judges are to receive the full benefits accorded them under the Ethics Reform Act. Those benefits being a pay raise in 1991 and an ECI adjustment in any year in which an ECI adjustment is given to General Schedule employees.

VI

In sum, the Court concludes that Section 140 was not permanent legislation and that, in any event, it has no effect on the cost-of-living adjustments made under the Ethics Reform Act. The Ethics Reform Act was effective

on January 1, 1991, and the entitlement to annual cost-of-living adjustments under that Act vested on January 1, 1991, subject only to one condition, that such an adjustment be given to General Schedule employees for the same year. Accordingly, the plaintiffs are entitled to summary judgment, and the motion for summary judgment filed by the defendant will be denied with prejudice. The federal judges have not asked for and are not entitled to a cost-of-living adjustment for Fiscal Year 1994 since there was no adjustment for General Schedule employees for that year. The federal judges are entitled to cost-of-living adjustments for 1995, 1996 and 1997, together with all other benefits which should have accrued to them based upon those adjustments.

Finally, the Court concludes that in view of the fact that the ECI adjustments vested as of the effective date of the Ethics Reform Act, those adjustments cannot be withheld pursuant to Section 140 in any event, since such action would serve to unconstitutionally diminish the compensation of Article III judges in violation of the Compensation Clause of the Constitution of the United States.

An appropriate order shall be entered.

July 15, 1999

//s//
JOHN GARRETT PENN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SPENCER WILLIAMS,
et al.,

Plaintiffs

v. **Civil Action**
No. 97-3106(JGP)

UNITED STATES OF AMERICA,

Defendant

ORDER

This comes before the Court on the plaintiffs' **Motion for Summary Judgment** and the defendant's **Motion for Summary Judgment**. After giving careful consideration to the motions, the Court concludes, for the reasons set forth in the accompanying Opinion, that the plaintiffs' motion for summary judgment should be granted and the defendant's motion for summary judgment should be denied with prejudice.

It is hereby

ORDERED that the plaintiffs' motion for summary judgment is granted, and it is further

ORDERED that judgment will be entered in favor of the plaintiffs and the members of their class, and it is further

ORDERED that the defendant's motion for summary judgment is denied with prejudice, and it is further

ORDERED that the plaintiffs and the members of their class shall receive Employment Cost Index adjustments, sometimes referred to as cost-of-living adjustments, pursuant to the Ethics Reform Act of 1989, for the years 1995, 1996 and 1997, together with all other benefits which should have accrued to them based upon those adjustments, and it is further

ORDERED that such ECI adjustments shall be paid to the plaintiffs and the members of their class in the future years pursuant to the Ethics Reform Act of 1989, and it is further

ORDERED that the defendant shall take appropriate action to calculate the amount due the plaintiffs and the members of their class pursuant to and consistent with the Opinion and this Order in accordance with the schedule to be set in a following Order, and it is further

ORDERED that this Order is the final and appealable order of the Court.

July 15, 1999

//s//
JOHN GARRETT PENN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SPENCER WILLIAMS,
et al.,

Plaintiffs

v. **Civil Action**
No. 97-3106(JGP)

UNITED STATES OF AMERICA,

Defendant

ORDER

This comes before the Court on the question as to whether the plaintiffs are entitled to received [sic] prejudgment interest on the judgment entered in this case. *See Williams v. United States*, 48 F.Supp. 2d 52 (D.D.C. 1999) (*Williams I*) and the Order filed on July 15, 1999. After giving careful consideration to the briefs submitted by the parties, the Court concludes, for the reasons stated in the Memorandum to be filed, that the plaintiffs and the members of the class are entitled to receive prejudgment interest and that such interest shall be compound interest which shall be compounded annually using the 52-week Treasury bill rate.

It is hereby

ORDERED that the judgment entered in favor of the plaintiffs and the class shall include prejudgment interest,

compounded annually using the 52-week Treasury bill rate.

Dec. 29, 1999

//s//
JOHN GARRETT PENN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SPENCER WILLIAMS,
et al.,

Plaintiffs

v.

UNITED STATES OF AMERICA,

Defendant

Civil Action
No. 99-1982(JGP)

ORDER

This comes before the Court on the plaintiffs' **Motion for Summary Judgment** and the defendant's **Motion for Summary Judgment**. After giving careful consideration to the motions, the Court concludes, for the reasons stated in a Memorandum to be filed, and the Opinion filed in *Williams v. United States*, 48 F.Supp. 2d 52 (D.D.C. 1999) (*Williams I*), that the plaintiffs' motion for summary judgment should be granted and the defendant's motion for summary judgment should be denied with prejudice.

It is hereby

ORDERED that the plaintiffs' motion for summary judgment is granted, and it is further

ORDERED that judgment will be entered in favor of the plaintiffs and the members of their class, and it is further

ORDERED that the defendant's motion for summary judgment is denied with prejudice, and it is further

ORDERED that the plaintiffs and the members of their class shall receive Employment Cost Index adjustments, sometimes referred to as cost-of-living adjustments, pursuant to the Ethics Reform Act of 1989, for the year 1999, together with all other benefits which should have accrued to them based upon those adjustments, and it is further

ORDERED that the Employment Cost Index adjustments shall be paid to the plaintiffs and the members of their class in the future years pursuant to the Ethics Reform Act of 1989, and it is further

ORDERED that the defendant shall take appropriate action to calculate the amount due the plaintiffs and the members of their class pursuant to and consistent with the decision in *Williams I*, the Memorandum filed in this case, and this Order, and the Order filed in *Williams I* on December 29, 1999, if applicable, in accordance with the schedule to be set in a following Order, and it is further

ORDERED that this Order is the final and appealable order of the Court.

Dec. 29, 1999

//s//
JOHN GARRETT PENN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SPENCER WILLIAMS, *et al.*,

Plaintiffs

v.

UNITED STATES OF AMERICA,

Defendant

Civil Action
No. 97-3106 (JGP)

MEMORANDUM

The plaintiffs, who are federal judges appointed pursuant to Article III of the Constitution of the United States, filed this case as a class action and asked this Court to declare that Section 140 of Pub.L. No. 97-92 (Section 140) does not operate to prevent the payment of Employment Cost Index (ECI) adjustments due federal judges under the Ethics Reform Act of 1989 (Pub.L, No. 101-194, 103 Stat. 1716) (now codified at 5 U.S.C. § 5318, note), sometimes hereinafter referred to as the "1989 Act." The Court certified the case as a class action. Thereafter the parties filed cross-motions for summary judgment. The Court heard oral arguments and after giving careful consideration to the arguments of the parties, the Court denied the defendant's motion for summary judgment and granted the plaintiffs' motion for summary judgment and entered judgment for the plaintiffs and the members of their class. *Williams v. United States*, 48 F.Supp. 2d 52 (D.D.C. 1999). The Court ordered that the plaintiffs and the members of their class shall receive ECI adjustments, sometimes referred to as cost-of-living

adjustments pursuant to the Ethics Reform Act of 1989, for the years 1995, 1996 and 1997, together with all other benefits which should have accrued to them based upon those adjustments. The defendant has appealed that decision.

The case is now before the Court on the issue of whether the plaintiffs and the members of the class are entitled to prejudgment interest, and if so, whether that interest should be compound or simple interest, and if compound, the frequency of compounding.

The plaintiffs argue that they are entitled to prejudgment interest for fiscal years 1995, 1996 and 1997 and that the interest should be calculated using the 52-week Treasury bill rate, compounded annually. Although the plaintiffs recognize that "as a general rule" interest does not run on a claim against the United States, they argue that under certain circumstances a plaintiff may be entitled to interest pursuant to a constitutional requirement. They contend that this is such a case. On the other hand, the defendant argues that the plaintiffs are not entitled to prejudgment interest since there has not been a waiver of sovereign immunity to allow an award of interest under the facts of this case and, if the plaintiffs are entitled to an award for prejudgment interest, it should be no more than simple interest.

The Supreme Court held "[t]he rule is that, in the absence of a stipulation to pay interest or a statute allowing it, none can be recovered against the United States upon unpaid accounts or claims." *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 304, 43 S.Ct. 354, 355 (1923) (citations omitted). However, the Supreme Court

went on to state, in part, that in a condemnation case, "[j]ust compensation is provided for by the Constitution and the right to it cannot be taken away by statute." 261 U.S. at 304, 43 S.Ct. at 356 (citation omitted). The provision of the Constitution referred to by the Supreme Court in *Seaboard* is the Fifth Amendment which provides, in part, "nor shall private property be taken for public use, without just compensation." The Court went on to reason that "[t]he compensation to which the owner is entitled is the full and perfect equivalent of the property taken. It rests on equitable principles and it means substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken." *Id.* (citations omitted). The Supreme Court noted that "[w]here the United States condemns and takes possession of land before ascertaining or paying compensation, the owner is not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking. *Interest at the proper rate is a good measure by which to ascertain the amount so to be added.*" 261 U.S. at 306, 43 S.Ct. at 356 (emphasis this Court's).

The plaintiffs argue that, just as in the case of an award for interest in a condemnation case, they are entitled to an award for interest under the Compensation Clause of Article III of the Constitution. There, it is provided, in part, that judges appointed pursuant to Article III "shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

This Court observed in *Williams v. United States*, 48 F. Supp. 2d at 55, that the Supreme Court noted in *United States v. Will*, 449 U.S. 200, 217-218, 101 S.Ct. 471, 482 (1980), that "[t]he Compensation Clause has its roots in the long-standing Anglo-American tradition of an independent Judiciary. A Judiciary free from control by the Executive and the Legislative is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government." A review of the history of the Compensation Clause makes clear that the Clause is one of the rocks making up the foundation upon which judicial independence is constructed. There was a concern that absent the protection of the judges' compensation the other branches could exert influence over the judiciary by indirectly affecting the pay of judges. This was recognized by Hamilton, Madison, Morris and the other Founding Fathers. *See Williams v. United States*, 48 F. Supp. 2d at 55-57. It seems certain that the protection of that judicial independence serves a more important function than does the award of interest to persons whose property has been taken. Thus, it is unlikely that the Compensation Clause gives less than the "just compensation" provision of the Fifth Amendment. As noted above, the Compensation Clause, a clause contained in Article III of the Constitution, provides that the judges appointed under Article III "*shall, at stated times,* receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." To provide for a cost of living adjustment on a given date, but to thereafter fail to pay that upward adjustment over a period of time, and then to pay only the amount of the upward adjustment in pay without

including prejudgment interest, is to withhold a part of that pay adjustment notwithstanding that it has already accrued to the judges pursuant to the 1989 Act. In effect, the defendant would be rescinding a [sic] least a portion of the cost of living adjustment after it went into effect. This the Constitution forbids.

The facts of this case amply demonstrate the problem with the argument made by the defendant. One of the years involved in this case is 1995. The Court held that with respect to 1995, as in the case of 1996 and 1997, the ECI adjustment was due, yet the adjustment has never been received by the plaintiffs. To withhold an award for prejudgment interest would result in the failure of the defendant to pay a portion of that adjustment for over three years. This Court reads the phrase "at stated Times" to mean what it states - the Article III judge is entitled to *full* compensation as of the day the adjustment accrues. To read it any other away would violate the Compensation Clause. This result is easily avoided, however, because, as the Supreme Court has stated, "interest at the proper rate is a good measure by which to ascertain the amount to be added" and to afford judges full compensation. *Seaboard*, 261 U.S. at 306, 43 S.Ct. at 356. The Court concludes then that the plaintiffs are entitled to an award of prejudgment interest and that award is based, not on a contract or a statute, but on the Constitution of the United States.

Having awarded prejudgment interest to the plaintiffs, the remaining issue is whether that interest should be compound interest or simple interest. The parties agree that the decision whether to award compound interest is within the discretion of the Court. The Court

found for the plaintiffs for the reasons set forth in *Williams, supra*. The Constitution provides that the pay of judges appointed under Article III *shall* not be reduced. For this reason, the Court awarded prejudgment interest. Since there is a requirement under the Constitution that the judges be *fully* compensated, the Court concludes that compound interest must be awarded to satisfy that requirement. Interest shall be compounded annually using the 52-week Treasury bill rate.

An appropriate order has been entered.

Jan. 12, 2000

//s//
JOHN GARRETT PENN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SPENCER WILLIAMS, *et al.*,

Plaintiffs

v.

UNITED STATES OF AMERICA,

Defendant

Civil Action
No. 99-1982 (JGP)

MEMORANDUM

The plaintiffs are seventeen United States District Court judges appointed pursuant to Article III of the Constitution of the United States. They filed this action seeking to have the Court declare that Section 140 of Pub.L. No. 97-92 (Section 140) does not operate to prevent the payment of Employment Cost Index (ECI) adjustments due federal judges under the Ethics Reform Act of 1989 (Pub. L. No. 101-194, 103 Stat. 1716) (now codified at 5 U.S.C. § 5318, note), sometimes hereafter referred to as the "1989 Act," "because: (1) Section 140 expired on September 30, 1982; or (2) the provisions of Section 140 were superseded by the Ethics Reform Act of 1989, and/or the salary adjustments payable by operation of th Ethics Reform Act have been 'authorized by Act of Congress hereafter enacted' within the meaning of Section 140. Otherwise this Court should declare that Section 140 is unconstitutional and void."

The Court certified this case as a class action. Order filed September 24, 1999. The case then came before the

Court on the plaintiffs' **Motion for Summary Judgment** and the defendant's **Motion for Summary Judgment**. The ECI adjustment that is the subject of this case is that for 1999.

Article III, Section 1 of the Constitution provides, in pertinent part, that judges of the United States Courts "shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation which shall not be diminished during their Continuance in Office." (The Compensation Clause). The compensation of a federal district judge, appointed pursuant to Article III, is defined, in part, at 28 U.S.C. § 135, which provides in pertinent part: "Each judge of a district court of the United States shall receive a salary at an annual rate determined under Section 225 of the Federal Salary Act of 1967 (2 U.S.C. §§ 351-361) (Salary Act) as adjusted by" 28 U.S.C. § 461, of the Executive Salary Cost-of-Living Adjustment Act (Adjustment Act). The plaintiffs contend that the Adjustment Act, as amended by the Ethics Reform Act, requires that the salary of a federal judge be adjusted annually pursuant to an index set forth in the 1989 Act. The plaintiffs note that the adjustment is subject to one condition only, that there be in the same fiscal year an adjustment in the rates of pay of positions covered by the General Schedule determined under the Federal Pay Comparability Act of 1970, Pub. L. No. 91-656, 84 Stat. 1946 (1971), codified at 5 U.S.C. 5305-5306 (Comparability Act). The Comparability Act is the mechanism for annually adjusting the rates of pay of most federal employees to reflect increases in cost of living and salary increases in the private sector.

In the Ethics Reform Act, Congress revised the pay system for high-ranking government officials, including federal judges. The Act changed the method by which the salary of federal judges would be periodically reviewed by the Commission, imposed severe limitations on the outside income judges can earn, forbade receipt of honorariums and provided a new mechanism for annual adjustments to judges' pay. The Ethics Reform Act provided that each judge would receive a base salary increase, effective January 1, 1991. Relevant to the contentions of the plaintiffs, the Act provided that, beginning in 1991 and in each subsequent year, the salary of a federal judge shall be adjusted based upon a specific schedule and index. Under the Act, in any year in which salaries of General Schedule employees are adjusted under the Comparability Act, federal judges' salaries are to be adjusted by an amount equal to one-half of one percent less than the percentage change in the ECI for the period ended December of the previous year. Ethics Reform Act, § 704(a)(1)(B). The statute also provides a five percent cap on any adjustment per year. Thus, according to the plaintiffs, the law makes the ECI adjustment automatic, the only condition being that there must be an adjustment in the rates of pay for General Schedule employees in the same year. Absent an adjustment for General Schedule employees, there is no adjustment for the judges.

The federal judges' salaries were adjusted pursuant to the Ethics Reform Act on the first day of January 1991, 1992 and 1993. In 1994, there was no adjustment for General Schedule employees and as a result no adjustment for the judges. There were ECI adjustments for General Schedule employees in 1995, 1996, 1997 and 1999,

but no ECI adjustment or COLA for the federal judges in those years. It is 1999 and future compensation that are the subject of this case. As argued by the defendant, the failure of the federal judges to receive ECI adjustments for 1999 resulted from the fact that Congress, acting pursuant to Section 140, did not vote an ECI adjustment for federal judges in those years.

This Court addressed the same issues in *Williams v. United States*, 48 F. Supp. 2d 52 (D.D.C. 1999) (*Williams I*), which involved years 1995, 1996 and 1997. In its opinion in that case, this Court stated:

> In sum, the Court concludes that Section 140 was not permanent legislation and that, in any event, it has no effect on the cost-of-living adjustments made under the Ethics Reform Act. The Ethics Reform Act was effective on January 1, 1991, and the entitlement to annual cost-of-living adjustments under that Act vested on January 1, 1991, subject only to one condition, that such an adjustment be given to General Schedule employees for the same year. Accordingly, the plaintiffs are entitled to summary judgment, and the motion for summary judgment filed by the defendant will be denied with prejudice. The federal judges have not asked for and are not entitled to a cost-of-living adjustment for Fiscal Year 1994 since there was no adjustment for General Schedule employees for that year. The federal judges are entitled to cost-of-living adjustments for 1995, 1996 and 1997, together with all other benefits which should have accrued to them based upon those adjustments.

Finally, the Court concludes that in view of the fact that the ECI adjustments vested as of

> the effective date of the Ethics Reform Act, those adjustments cannot be withheld pursuant to Section 140 in any event, since such action would serve to unconstitutionally diminish the compensation of Article III judges in violation of the Compensation Clause of the Constitution of the United States.

48 F.Supp. 2d at 64-65.

The issues raised in this case have been addressed and decided in *Williams I*. What has been said in that case applies with equal force here. The Court therefore adopts its Opinion in that case and concludes that the defendant's motion for summary judgment should be denied with prejudice and that the plaintiffs' [sic] for summary judgment should be granted.

An appropriate order has been entered.

Jan. 13, 2000

//s//
JOHN GARRETT PENN
United States District Judge

United States Court of Appeals
for the Federal Circuit

99-1572, 00-1254,-1255

SPENCER WILLIAMS, AUBREY E. ROBINSON, JR., C. CLYDE ATKINS, LOUIS C. BECHTLE, SANDRA S. BECKWITH, LUCIUS D. BUNTON, III, WILLIAM M. BYRNE, JR., ADRIAN G. DUPLANTIER, IRVING HILL, MORRIS E. LASKER, THOMAS C. PLATT, JR., JOHN W. REYNOLDS, WALTER H. RICE, MARVIN H. SHOOB, JOSEPH L. TAURO, LAUGHLIN E. WATERS, LEE R. WEST, CHARLES WIGGINS and HENRY R.WILHOIT, JR.,

Plaintiffs-Appellees,

v.

UNITED STATES,

Defendant-Appellant.

ORDER

The appeals, having been argued before a panel of the court and, thereafter, a poll of the judges in regular active service to determine whether they should be heard en banc was conducted at the suggestion of an active judge.

Upon consideration thereof,

The court declined to hear the appeals en banc.

Circuit Judges Clevenger and Gajarsa concur in a separate opinion, which will be issued in due course.

Chief Judge Mayer dissents in a separate opinion, in which Circuit Judges Newman and Rader join.

Circuit Judge Newman dissents in a separate opinion, in which Chief Judge Mayer and Circuit Judge Rader join.

FOR THE COURT,

February 16, 2001
Date

//s//
Jan Horbaly
Clerk

United States Court of Appeals
for the Federal Circuit

99-1572, 00-1254, -1255

SPENCER WILLIAMS, AUBREY E. ROBINSON, JR., C. CLYDE ATKINS, LOUIS C. BECHTLE, SANDRA S. BECKWITH, LUCIUS D. BUNTON, III, WILLIAM M. BRYNE, JR., ADRIAN G. DUPLANTIER, IRVING HILL, MORRIS E. LASKER, THOMAS C. PLATT, JR., JOHN W. REYNOLDS, WALTER H. RICE, MARVIN H. SHOOB, JOSEPH L. TAURO, LAUGHLIN E. WATERS, LEE R. WEST, CHARLES WIGGINS, and HENRY R. WILHOIT, JR.,

Plaintiffs-Appellees,

v.

UNITED STATES,

Defendant-Appellant.

MAYER, *Chief Judge*, with whom NEWMAN and RADER, *Circuit Judges*, join, dissenting from the order declining rehearing *en banc*.

Because I believe this case is wrongly decided and the court has declined to take it en banc, I respectfully dissent.

Article III, section 1 of the Constitution provides that "[t]he Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." The Compensation Clause is intended to promote judicial independence from the legislative and executive branches of government and external influences, and to ensure that the federal courts are able to

attract quality people to the bench. *See United States v. Will*, 449 U.S. 200, 220-21 (1980); *O'Donoghue v. United States*, 289 U.S. 516, 530-33 (1933); *Evans v. Gore*, 253 U.S. 245, 253-54 (1920). It would be unhealthy, if not unseemly, were judicial service acceptable by only those of means on the one hand, and those of marginal competence on the other. The prohibition of diminution is not intended for the benefit of the judges, but to enhance the quality of justice for everyone. *See Evans*, 253 U.S. at 253. In giving effect to these purposes, the Supreme Court has broadly interpreted the Compensation Clause to protect against the remotest influence, direct or indirect, by the other branches of government. *See id.* at 253-54. Independence translates to integrity.

The Rule of Necessity compels the courts to adjudicate judicial pay cases. It would alleviate the attendant squeamishness if one kept his eye on the constitutional principle instead of the admittedly paltry sums at issue when he engages in what is really just garden variety statutory interpretation. This is not an occasion for fastidiousness. If the judicial department will not tend the fences between it and the legislative and executive, no one else is going to do it.

The Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716, is more than the mere "method of calculating salaries" at issue in *Will*, 449 U.S. at 227. It is a comprehensive codification of ethical rules (§§ 301-303), financial reporting requirements (§ 202), work rules for senior judges (§ 705), prohibitions on outside income and honoraria (§ 601), a twenty-five percent pay raise (§ 703), and future cost of living adjustments (COLAs) (§ 704). It was passed as and was intended to be a package, the

parts unseverable one from the other. *Cf. United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 478 (1995); 135 Cong. Rec. H29,484 (statement of Rep. Martin stating that the Ethics Reform Act of 1989 is a comprehensive and interrelated package).

The judicial COLA provisions of the Ethics Reform Act are linked to adjustments to General Schedule (GS) salaries. In any year in which GS salaries are adjusted under 5 U.S.C. § 5303(a), federal judges' salaries automatically increase by a statutorily defined formula based on the Employment Cost Index (ECI) published by the Bureau of Labor Statistics. *See* Ethics Reform Act § 704(a)(1). No additional action is required by Congress or the President to implement the salary adjustments.

The court relies on *Will* for the proposition that Congress may eliminate judicial COLAs so long as they act before the COLAs are "payable and due." 449 U.S. at 228-29. But that is the question here, not the answer. The Ethics Reform Act invoked the provisions of 28 U.S.C. § 461(a)(1) to establish the timing of judicial COLAs. Pay increases in the form of COLAs are "effective at the beginning of the first applicable pay period commencing on or after the first day of the month in which an adjustment takes effect under section 5303 of title 5 in the rates of pay under the General Schedule." The court interprets the effective date of the pay increase as determinative of when the COLAs are "payable and due." Therefore, it peremptorily but not persuasively says that under the rule of *Will*, Congress may block judicial COLAs any time before the effective date of the COLA.

But in *Will*, the Supreme Court was faced with a statutory scheme totally different from the Ethics Reform Act: the Executive Salary Cost-of-Living Adjustment Act of 1975 (Adjustment Act), Pub L. No. 94-82, 89 Stat. 419. The Adjustment Act tied judicial salary increases to adjustments made to GS salaries under the Federal Pay Comparability Act of 1970, 5 U.S.C. §§ 5305-06. Under the Comparability Act, an independent recommendation on salary adjustments was made to the President. The President could either issue an order implementing the recommended adjustments to salaries and submit a report to Congress, or submit to Congress an alternative salary adjustment plan. Either House of Congress could object to the alternative plan, in which case the independent recommendation would take effect. *See Will*, 449 U.S. at 203-04 (describing the procedures of the Comparability Act).

Under the Adjustment Act, judicial COLAs were contingent upon subsequent actions of the President and Congress. The act did not change judicial pay; it merely modified the existing formula for determining what it would be. *See Will*, 449 U.S. at 227. Not so the Ethics Reform Act. As part and parcel of the restrictions on judges accepting outside income and honoraria and the other burdens, Congress raised judicial pay and attached an automatic COLA provision intended to maintain that pay level until it might consider another pay raise advisable. Each adjustment is just a ministerial application of the ECI. *Will* does not apply because the salary adjustments are not "payable and due" as of the effective date of each annual increase; they became payable and due on the effective date of the statute, January 1, 1991. Unlike

the Adjustment Act, the Ethics Reform Act created essentially a structured payment plan with a twenty-five percent immediate pay increase coupled with automatic COLAs based on the ECI to maintain the value of the salaries during inflation. Fixing future salaries by adopting an indexing plan is the same for all intents and purposes as specifying actual dollars. *See Boehner v. Anderson*, 30 F.3d 156, 162 (D.C. Cir. 1994) ("We see no reason whatsoever why the Congress cannot, for convenience, instead specify an index or formula with the same effect."). Blocking the automatic COLAs, after January 1, 1991, therefore, runs afoul of *Will* and Article III.

The immediate vesting of the judicial COLAs in 1991 is confirmed by the need for Congress to satisfy the then impending 27th Amendment to the Constitution, which provides: "No law, varying the compensation [of Members of Congress], shall take effect until an election of Representatives shall have intervened." Congress knew that ratification was imminent and that the amendment would prevent individual COLA provisions from taking effect during future congressional terms in which they became effective. By imbedding an automatic COLA mechanism, the Ethics Reform Act avoids the 27th Amendment's prohibition of current term pay adjustments for Members of Congress. *See Boehner*, 30 F.3d at 161-62. The identical automatic judicial COLA provision took effect the same time as Congress' COLA provision, thereby becoming "due and payable" on January 1, 1991. It would be incongruous in the extreme if Congress vested COLA's for the purposes of the 27th Amendment but not Article III. The identical language used in the

same law for each branch of government should be interpreted consistently, especially since Congress was legislating against the backdrop of *Will* and strove mightily to satisfy it.

Boehner did not reach another argument, that blocking of congressional COLAs was therefore a "varying" of pay in violation of the 27th amendment. That is to say, if the COLA was vested in 1991, any action to block it from kicking in during a subsequent session is a prohibited variance. But, of course, that is precisely what it is under Article III.

The differences between the Ethics Reform Act and the system discussed in *Will* are the essence of the legislative bargain that is an alternative basis for affirmance of the district court's judgment. As the district court aptly observed and this court discounts, these differences were:

> I. First, the district court noted that the 1989 [Ethics Reform] Act "imposes severe limitations on the outside income federal judges may earn, forbids the receipt of honorar[ia] and imposes mandatory work loads on senior judges." *Williams [v. United States]*, 48 F. Supp. 2d [52,] 57 [(D.D.C. 1999)].
>
> II. Second, the district court noted that the 1989 [Ethics Reform] Act "revised the process for providing annual cost-of-living adjustments for federal judges" by establishing a "trigger" when there is an adjustment to GS salaries, and that "Congress took control and prescribed the means for determining the annual pay adjustment." *Id.*
>
> III. And third, the district court noted that the 1989 [Ethics Reform] Act set a five percent cap on the amount of any COLA for federal judges. *See id.*

Slip op. at 23. Contrary to this court's contention, however, the first distinction is important; it is the essence of the bargain struck by Congress, whereby it would provide regular cost-of-living adjustments to maintain the value of the concomitant twenty-five percent salary increase in exchange for the limitations on outside income and honoraria and the mandatory work loads on senior judges. I am willing to assume for the moment that Congress could have restricted outside income, generally from teaching, and honoraria without creating a mechanism for offsetting cost-of-living adjustments because it is irrelevant to the legislative bargain that was actually struck in the Ethics Reform Act. *But cf. Nat'l Treasury Employees Union*, 513 U.S. at 478.

As the dissent correctly says, the Task Force report and recommendations spoke directly to the relationship between limitations on honoraria and outside earned income, and the need for adjustments in the salaries of senior government officials. The Task Force "consider[ed] the salary provisions of its recommendations to be an integral part of the total ethics package being proposed. . . . Along with adequate compensation there should be less need to supplement income from outside sources." *Report of the Bipartisan Task Force on Ethics on H.R. 3660, Government Ethics Reform Act of 1989*, 101st Cong. (1989), 135 Cong. Rec. H9265. Indeed, there were efforts in both houses of Congress to separate the salary provisions from the ethics reforms, all of which failed. If they were not inextricable, no one would have wasted the time in the effort. There is, therefore, no ambiguity in

Congress's purpose to provide the regular cost-of-living adjustments to maintain adequate pay in exchange for the prohibitions on outside earnings and the rest.

The court believes that the legislative bargain applies only to those federal judges that had previously sought compensation for extra activities. This misapprehends the nature of the bargain among members of Congress, which recognized the impropriety of imposing income-earning restrictions without providing a reliable mechanism to maintain an adequate salary in return. There was no effort to limit the benefits of that bargain to those who had actually sought additional sources of income or honoraria, and it is improper for the court to assign one. The bargain was intended to affect all federal judges and to remove the need for additional income then and in the future. But even if some judges still felt the need, they no longer had the opportunity. That is what was lost by all judges, not just those who had outside earnings before the effective date of the act. In light of the gross increase in outside money sluicing through governance in the last decade, I suspect far more judges would have had the opportunity, if not the inclination, to partake were it not for the still extant prohibition. Simply put, in blocking the judicial COLAs for 1995, 1996, 1997 and 1999, Congress "withhold[s] or take[s] from a judge a part of that which has been promised by law for his services." *Evans* at 254. I would vacate this court's opinion and affirm the judgment of the United States District Court for the District of Columbia.

February 16, 2001

United States Court of Appeals
for the Federal Circuit

99-1572, 00-1254, -1255

SPENCER WILLIAMS, AUBREY E. ROBINSON, JR., C. CLYDE ATKINS, LOUIS C. BECHTLE, SANDRA S. BECKWITH, LUCIUS D. BUNTON, III, WILLIAM M. BRYNE, JR., ADRIAN G. DUPLANTIER, IRVING HILL, MORRIS E. LASKER, THOMAS C. PLATT, JR., JOHN W. REYNOLDS, WALTER H. RICE, MARVIN H. SHOOB, JOSEPH L. TAURO, LAUGHLIN E. WATERS, LEE R. WEST, CHARLES WIGGINS, and HENRY R. WILHOIT, JR.,

Plaintiffs-Appellees,

v.

UNITED STATES,

Defendant-Appellant.

NEWMAN, *Circuit Judge*, with whom MAYER, *Chief Judge*, and RADER, *Circuit Judge*, join, dissenting from the order declining hearing en banc.

It is the right, privilege, and duty of the courts to assure that the constitutional safeguards are preserved. No safeguard is more fundamental than the separation of governmental power, the checks and balances, among the three branches. This case is not about the cost of living. It is about the balance of governmental power.

The action of the Congress in recent years, to withhold from the judges the monetary adjustment that is provided to all others serving the federal government, is as petty as it is unconstitutional. The Framers were concerned that Congress, if unchecked, would dominate the coordinate branches through the power of the purse. *See*

The Federalist No. 48, 308, 310 (James Madison) (Clinton Rossiter ed., 1961) (the most difficult task was to provide "practical security for each against the invasion of others" and particularly of the legislature, who as sole possessor of the fiscal power "can, with the greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the coordinate departments.") Madison cautioned that as "the legislative department alone has access to the pockets of the people" it has "a prevailing influence, over the pecuniary rewards of those who fill the other departments." *Id.* at 310.

The Framers recognized that an independent judiciary is the bulwark of justice –

> independent not in the sense that they shall not co-operate to the common end of carrying into effect the purposes of the Constitution, but in the sense that the acts of each shall never be controlled by, or subjected, directly or indirectly, to, the coercive influence of either of the other departments.

O'Donoghue v. United States, 289 U.S. 516, 530 (1933). It is our judicial duty to act, with vigor and determination, to sustain this fundamental structure, to set aside any action of the legislative that departs from the constitutional design. In securing the Constitution, "no restriction upon its plain and obvious import ought to be admitted, unless the inference is irresistible." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 338-39 (1816). The Court has well recognized the significance of control of judicial compensation in the federal structure:

> [T]here rests upon every federal judge affected nothing less than a duty to withstand any attempt, directly or indirectly in contravention of the Constitution, to diminish this compensation, not for his own private advantage which, if that were all, he might willingly forego but in the interest of preserving unimpaired an essential safeguard adopted as a continuing guaranty of an independent judicial administration for the benefit of the whole people.

O'Donoghue, 289 U.S. at 533.

This concern for judicial independence is now, once more, presented for judicial resolution. Today's politics-driven tweaking of the judiciary is, at bottom, an assault on the balance between the judicial and the political branches of government. The implicit ratification, by a panel of this court, of Congress' actions – both the tying of judges' compensation to that of Congress and the withdrawal from judges of the statutory adjustment provided to all federal employees – is a misreading of precedent as well as of the Constitution.

The separation of powers is not only the balance and check upon the powers of the other branches; it is also the fulcrum of the institution of judicial review of legislative and executive action. The cavalier actions here at issue belie their significance to the nation; they confirm the prescience of the Framers in imparting constitutional force to insulation of the judiciary from politically motivated pay reduction:

> In framing the Constitution, therefore, the power to diminish the compensation of federal judges was explicitly denied, in order, inter alia, that their judgment or action might never be swayed in the slightest degree by the temptation to cultivate the favor or avoid the displeasure of

> that department which, as master of the purse, would otherwise hold the power to reduce their means of support.

O'Donoghue, 289 U.S. at 531.

The nineteen judges who have come forward as plaintiffs, the split decision of the panel, the carefully reasoned district court decision, and the national concern for proper exercise of governmental power, warrant the attention of our full court. From the refusal of the court to consider this matter en banc I must, respectfully, dissent.

February 16, 2001

United States Court of Appeals for the Federal Circuit

99-1572, 00-1254, -1255

SPENCER WILLIAMS, AUBREY E. ROBINSON, JR., C. CLYDE ATKINS, LOUIS C. BECHTLE, SANDRA S. BECKWITH, LUCIUS D. BUNTON, III, WILLIAM M. BYRNE, JR., ADRIAN G. DUPLANTIER, IRVING HILL, MORRIS E. LASKER, THOMAS C. PLATT, JR., JOHN W. REYNOLDS, WALTER H. RICE, MARVIN H. SHOOB, JOSEPH L. TAURO, LAUGHLIN E. WATERS, LEE R. W[illegible], CHARLES WIGGINS, and HENRY R. WILHOIT, JR.,

Plaintiffs-Appellees,

v.

UNITED STATES,

Defendant-Appellant.

CLEVENGER and GAJARSA, *Circuit Judges*, with whom MICHEL, LOURIE, SCHALL, BRYSON, LINN, and DYK, *Circuit Judges*, join, concurring in the order declining hearing *en banc*.

In response to a self-initiated poll within the court, a decision has been reached to deny *en banc* hearing of this case. The three judges who favored *en banc* hearing have dissented from the order denying *en banc* hearing.

Contrary to the dissents, however, this case involves no great new issue of principle. Rather the majority opinion narrowly decides this case on the basis of the Supreme Court's decision in the *Will* case.

Let it be understood clearly and with no reservation: we endorse the independence of the federal judiciary and

the strict enforcement of Article III to prevent any congressional attempts to diminish federal judicial compensation. But we are faced with a judicial compensation vesting rule articulated by the Supreme Court in *Will*, and we are duty-bound to enforce that rule. If we have incorrectly read the *Will* opinion, the Supreme Court will have the opportunity to correct the error.

Feb. 21, 2001

United States Court of Appeals for the Federal Circuit

99-1572, 00-1254, -1255

SPENCER WILLIAMS, AUBREY E. ROBINSON, JR., C. CLYDE ATKINS, LOUIS C. BECHTLE, SANDRA S. BECKWITH, LUCIUS D. BUNTON, III, WILLIAM M. BYRNE, JR., ADRIAN G. DUPLANTIER, IRVING HILL, MORRIS E. LASKER, THOMAS C. PLATT, JR., JOHN W. REYNOLDS, WALTER H. RICE, MARVIN H. SHOOB, JOSEPH L. TAURO, LAUGHLIN E. WATERS, LEE R. WEST, CHARLES WIGGINS, and HENRY R. WILHOIT, JR.,

Plaintiffs-Appellees,

v.

UNITED STATES,

Defendant-Appellant.

ORDER

The Appellees filed a combined petition for rehearing and suggestion for rehearing en banc. A response thereto was invited by the court, and filed by the Appellant. The petition for rehearing and response were referred to the panel that heard the appeal, and thereafter, the suggestion for rehearing en banc and response were referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

(1) The petition for rehearing is denied.

(2) The suggestion for rehearing en banc is denied.

Chief Judge Mayer and Circuit Judge Newman dissent without separate opinions.

The mandate will issue on May 7, 2001.

FOR THE COURT,

Apr. 30, 2001
Date

//s//
Jan Horbaly
Clerk

United States Court of Appeals for the Federal Circuit

99-1572, 00-1254, -1255

SPENCER WILLIAMS, AUBREY E. ROBINSON, JR., C. CLYDE ATKINS, LOUIS C. BECHTLE, SANDRA S. BECKWITH, LUCIUS D. BUNTON, III, WILLIAM M. BYRNE, JR., ADRIAN G. DUPLANTIER, IRVING HILL, MORRIS E. LASKER, THOMAS C. PLATT, JR., JOHN W. REYNOLDS, WALTER H. RICE, MARVIN H. SHOOB, JOSEPH L. TAURO, LAUGHLIN E. WATERS, LEE R. WEST, CHARLES WIGGINS, and HENRY R. WILHOIT, JR.,

Plaintiffs-Appellees,

v.

UNITED STATES,

Defendant-Appellant.

ORDER

The Appellees move for leave to file a second petition for rehearing or, in the alternative, suggestion for rehearing en banc, to recall the mandate issued on May 7, 2001, and to vacate the April 30, 2001 order denying their combined petition for rehearing and rehearing en banc. The Appellant files an opposition, and the Appellees file a reply to the opposition.

Upon consideration thereof,

IT IS ORDERED THAT:

(1) The motion is denied.

FOR THE COURT,

May 29, 2001
Date

//s//
Jan Horbaly
Clerk

ETHICS REFORM ACT PROVISIONS

Ethics Reform Act § 601

Section 601 of the Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1760-62, amended Title V of the Ethics in Government Act (codified at 5 U.S.C. app., §§ 501-505), to provide, in part:

Sec. 501. Outside Earned Income Limitation.

(a) *Outside Earned Income Limitation.* –

(1) Except as provided by paragraph (2), a Member or an officer or employee who is not a career civil servant and whose rate of basic pay is equal to or greater than the annual rate of basic pay in effect for grade GS-16 of the General Schedule under section 5332 of title 5, United States Code, may not in any calendar year have outside earned income attributable to such calendar year which exceeds 15 percent of the annual rate of basic pay for level II of the Executive Schedule under section 5313 of title 5, United States Code, as of January 1 of such calendar year.

(2) In the case of any individual who becomes a Member or an officer or employee who is not a career civil servant and whose rate of basic pay is equal to or greater than the annual rate of basic pay in effect for grade GS-16 of the General Schedule during a calendar year, such individual may not have outside earned income attributable to the portion of that calendar year which occurs after such individual becomes a Member, officer or employee which exceeds 15 percent of the annual rate of basic pay for level II of the Executive Schedule under section 5313 of title 5, United States Code, as of January 1 of such

calendar year multiplied by a fraction the numerator of which is the number of days such individual is a Member, officer or employee during such calendar year and the denominator of which is 365.

(b) *Honoraria Prohibition.* – An individual may not receive any honorarium while that individual is a Member, officer or employee.

(c) *Treatment of Charitable Contributions.* – Any honorarium which, except for subsection (b), might be paid to a Member, officer or employee, but which is paid instead on behalf of such Member, officer or employee to a charitable organization, shall be deemed not to be received by such Member, officer or employee. No such payment shall exceed $2,000 or be made to a charitable organization from which such individual or a parent, sibling, spouse, child, or dependent relative of such individual derives any financial benefit.

Sec. 502. Limitations on Outside Employment.

A Member or an officer or employee who is not a career civil servant and whose rate of basic pay is equal to or greater than the annual rate of basic pay in effect for grade GS-16 of the General Schedule shall not –

(1) affiliate with or be employed by a firm, partnership, association, corporation, or other entity to provide professional services which involves a fiduciary relationship for compensation;

(2) permit that Member's, officer's, or employee's name to be used by any such firm, partnership, association, corporation, or other entity;

(3) practice a profession which involves a fiduciary relationship for compensation;

(4) serve for compensation as an officer or member of the board of any association, corporation, or other entity; or

(5) receive compensation for teaching, without the prior notification and approval of the appropriate entity referred to in section 503.

Ethics Reform Act § 703

Section 703 of the Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1768, is codified at 5 U.S.C. § 5318 note, and provides:

(a) *Salary levels.* –

(1) *Executive positions.* – Effective the first day of the first applicable pay period that begins on or after January 1, 1991, the rate of basic pay for positions in the Executive Schedule shall be increased in the amount of 25 percent of their respective rates (as last in effect before the increase), rounded to the nearest multiple of $100 (or, if midway between multiples of $100, to the next higher multiple of $100).

(2) *Legislative positions; Office of the Vice President.* –

(A) *Generally.* – Effective the first day of the first applicable pay period that begins on or after January 1, 1991, the rate of basic pay for the offices and positions under subparagraphs (A) and (B) of section 225(f) of the Federal Salary Act

of 1967 (2 U.S.C. 356(A) and (B)) shall be increased in the amount of 25 percent of their respective rates (as last in effect before the increase), rounded to the nearest multiple of $100 (or, if midway between multiples of $100, to the next higher multiple of $100), except as provided in subparagraph (B).

(B) *Exceptions.* – Nothing in subparagraph (A) shall affect the rate of basic pay for a Senator, the President pro tempore of the Senate, or the majority leader or the minority leader of the Senate.

(3) *Judicial positions.* – Effective the first day of the first applicable pay period that begins on or after January 1, 1991, the rate of basic pay for the Chief Justice of the United States, an associate justice of the Supreme Court of the United States, a judge of a United States circuit court, a judge of a district court of the United States, and a judge of the United States Court of International Trade shall be increased in the amount of 25 percent of their respective rates (as last in effect before the increase), rounded to the nearest multiple of $100 (or, if midway between multiples of $100, to the next higher multiple of $100).

(b) *Coordination rule.* – If a pay adjustment under subsection (a) is to be made for an office or position as of the same date as any other pay adjustment affecting such office or position, the adjustment under subsection (a) shall be made first.

Ethics Reform Act § 704(a)(1)

Section 704(a)(1) of the Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1769, is codified at 5 U.S.C. § 5318 note, and provides:

(a) *Percent change in the Employment Cost Index.* –

(1) *Method for computing percent change in the ECI.* –

(A) *Definitions.* – For purposes of this paragraph –

(i) the term "Employment Cost Index" or "ECI" means the Employment Cost Index (wages and salaries, private industry workers) published quarterly by the Bureau of Labor Statistics; and

(ii) the term 'base quarter' means the 3-month period ending on December 31 of a year.

(B) *Method.* – For purposes of the provisions of law amended by paragraph (2), the 'most recent percentage change in the ECI', as of any date, shall be one-half of 1 percent less than the percentage (rounded to the nearest one-tenth of 1 percent) derived by –

(i) reducing –

(I) the ECI for the last base quarter prior to that date, by

(II) the ECI for the second to last base quarter prior to that date,

(ii) dividing the difference under clause (i) by the ECI for the base quarter referred to in clause (i)(II), and

(iii) multiplying the quotient under clause (ii) by 100, except that no percentage change determined under this paragraph shall be –

(I) less than zero; or

(II) greater than 5 percent.

Ethics Reform Act § 704(a)(2)(A)

Section 704(a)(2)(A) of the Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1769, amended, *inter alia*, 28 U.S.C. § 461(a) to provide:

Sec. 461. Adjustments in certain salaries

(b) Effective at the beginning of the first applicable pay period commencing on or after the first day of the month in which an adjustment takes effect under section 5305 of title 5 in the rates of pay under the General Schedule (except as provided in subsection (b)), each salary rate which is subject to adjustment under this section shall be adjusted by an amount, rounded to the nearest multiple of $100 (or if midway between multiples of $100, to the next higher multiple of $100) equal to the percentage of such salary rate which corresponds to the most recent percentage change in the ECI (relative to the date described in the next sentence), as determined under

section 704(a)(1) of the Ethics Reform Act of 1989. The appropriate date under this sentence is the first day of the fiscal year in which such adjustment in the rates of pay under the General Schedule takes effect.

Ethics Reform Act § 704(b)

Section 704(b) of the Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1769, is codified at 5 U.S.C. § 5318 note, and provides:

(b) *Effective Date*. This section and the amendments made by this section [amending 2 U.S.C. § 31; 3 U.S.C. § 104; 5 U.S.C. § 5318; 28 U.S.C. § 461] shall take effect on January 1, 1991.

Ethics Reform Act § 705

Section 705 of the Ethics Reform Act of 1989, Pub. L. No. 101-104, 103 Stat. 1770-71, amended 28 U.S.C. § 371(b) & (f), to provide:

Sec. 371. Retirement on salary; retirement in senior status.

* * *

(b) (1) Any justice or judge of the United States appointed to hold office during good behavior may retain the office but retire from regular active service after attaining the age and meeting the service requirements, whether continuous or otherwise, of subsection (c) of this section and shall, during the

remainder of his or her lifetime, continue to receive the salary of the office if he or she meets the requirements of subsection (f).

(2) In a case in which a justice or judge who retires under paragraph (1) does not meet the requirements of subsection (f), the justice or judge shall continue to receive the salary that he or she was receiving when he or she was last in active service or, if a certification under subsection (f) was made for such justice or judge, when such a certification was last in effect. The salary of such justice or judge shall be adjusted under section 461 of this title.

* * *

(f) (1) In order to continue receiving the salary of the office under subsection (b), a justice must be certified in each calendar year by the Chief Justice, and a judge must be certified by the chief judge of the circuit in which the judge sits, as having met the requirements set forth in at least one of the following subparagraphs:

(A) The justice or judge must have carried in the preceding calendar year a caseload involving courtroom participation which is equal to or greater than the amount of work involving courtroom participation which an average judge in active service would perform in three months. In the instance of a justice or judge who has sat on both district courts and courts of appeals, the caseload of appellate work and trial work shall be determined separately and the results of those determinations added together for purposes of this paragraph.

(B) The justice or judge performed in the preceding calendar year substantial judicial duties not involving courtroom participation

under subparagraph (A), including settlement efforts, motion decisions, writing opinions in cases that have not been orally argued, and administrative duties for the court to which the justice or judge is assigned. Any certification under this subparagraph shall include a statement describing in detail the nature and amount of work and certifying that the work done is equal to or greater than the work described in this subparagraph which an average judge in active service would perform in three months.

(C) The justice or judge has, in the preceding calendar year, performed work described in subparagraphs (A) and (B) in an amount which, when calculated in accordance with such subparagraphs, in the aggregate equals at least 3 months work.

(D) The justice or judge has, in the preceding calendar year, performed substantial administrative duties directly related to the operation of the courts, or has performed substantial duties for a Federal or State governmental entity. A certification under this subparagraph shall specify that the work done is equal to the full-time work of an employee of the judicial branch.

(E) The justice or judge was unable in the preceding calendar year to perform judicial or administrative work to the extent required by any of subparagraphs (A) through (D) because of a temporary or permanent disability. A certification under this subparagraph shall be made to a justice who certifies in writing his or her disability to the Chief Justice, and to a judge who certifies in writing his or her disability to the chief judge of the circuit in which the judge sits. A justice or judge who is certified under this

subparagraph as having a permanent disability shall be deemed to have met the requirements of this subsection for each calendar year thereafter.

(2) Determinations of work performed under subparagraphs (A), (B), (C), and (D) of paragraph (1) shall be made pursuant to rules promulgated by the Judicial Conference of the United States. In promulgating such criteria, the Judicial Conference shall take into account existing standards promulgated by the Conference for allocation of space and staff for senior judges.

(3) If in any year a justice or judge who retires under subsection (b) does not receive a certification under this subsection (except as provided in paragraph (1)(E)), he or she is therefore ineligible to receive such certification.

(4) In the case of any justice or judge who retires under subsection (b) during a calendar year, there shall be included in the determination under this subsection of work performed during that calendar year all work performed by that justice or judge (as described in subparagraphs (A), (B), (C), and (D) of paragraph (1)) during that calendar year before such retirement.

BLOCKING STATUTES

FY 1995

Section 630(a)(2) of Pub. L. No. 103-329, 108 Stat. 2382, 2424 (1994) provided as follows:

> For purposes of each provision of law amended by section 704(a)(2) of the Ethics Reform Act of 1989 (5 U.S.C. 5318 note), no adjustment under section 5303 of title 5, United States Code, shall be considered to have taken effect in fiscal year 1995 in the rates of basic pay for the statutory pay systems.

FY 1996

Section 633 of Pub. L. No. 104-52, 109 Stat. 468, 507 (1995) provided as follows:

> For purposes of each provision of law amended by section 704(a)(2) of the Ethics Reform Act of 1989 (5 U.S.C. 5318 note), no adjustment under section 5303 of title 5, United States Code, shall be considered to have taken effect in fiscal year 1996 in the rates of basic pay for the statutory pay systems.

FY 1997

Section 637 of Pub. L. No. 104-208, 110 Stat. 3009-364 (1996) provided as follows:

> For purposes of each provision of law amended by section 704(a)(2) of the Ethics Reform Act of 1989 (5 U.S.C. 5318 note), no adjustment under section 5303 of title 5, United States Code, shall be considered to have taken

effect in fiscal year 1997 in the rates of basic pay for the statutory pay systems.

FY 1999

Section 621 of Pub. L. No. 105-277, 112 Stat. 2681-518 (1998) provided as follows:

> For purposes of each provision of law amended by section 704(a)(2) of the Ethics Reform Act of 1989 (5 U.S.C. 5318 note), no adjustment under section 5303 of title 5, United States Code, shall be considered to have taken effect in fiscal year 1999 in the rates of basic pay for the statutory pay systems.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SPENCER WILLIAMS, [et al.], on their own behalf and on behalf of all persons similarly situated,	)	No. 97 CV 3106
Plaintiffs,	)	
vs.	)	
THE UNITED STATES OF AMERCIA	)	
Defendants.	)	

COMPLAINT

Plaintiffs, by their counsel, Kevin M. Forde, Richard J. Prendergast, and John S. Guttmann, Jr.[1] complain on their own behalf and on behalf of the classes as defined herein, and assert the following as their claims against the United States:

JURISDICTION AND NATURE OF THE CLAIM

1. This action against the United States is founded on the Constitution of the United States and certain acts of Congress. Plaintiffs invoke the jurisdiction of this Court under Title 28, United States Code, Section 1346(a)(2). In this action Plaintiffs allege that Defendant has violated the Constitution, Article III, Sec. 1, by denying payment of cost-of-living adjustments which were

---

[1] Serving as Local Counsel.

approved for all judges with the passage of the Ethics Reform Act of 1989.

THE PARTIES

2. (a) Plaintiff SPENCER WILLIAMS is a Senior United States District Judge and a member of the United States District Court for the Northern District of California.

* * *

3. Plaintiffs were appointed to their present offices within the United States Judiciary by the President of the United States, with the advice and consent of the United States Senate, pursuant to Article III of the Constitution of the United States, and have continuously served as Federal Judges, pursuant to Article III of the Constitution of the United States, since the dates of their appointments through and including the date of the filing of this action.

4. The Defendant is the United States of America.

CLASS ACTION ALLEGATIONS

5. This Complaint, and each Count thereof, is brought by Plaintiffs, on their own behalf and pursuant to Rule 23(b)(2), Fed. R. Civ. P., as a class action on behalf of all persons who are serving or who have served as Judges of the United States pursuant to Article III of the Constitution of the United States during the period applicable to each claim, as set forth in Count I through Count III. (Each Class is at times herein referred to as "Federal Judges.")

6. The Class in each Count consists of more than 1,000 persons and is so numerous that joinder of all its members before this Court is impracticable.

7. There are questions of law or fact common to the Class in each Count. The complaint seeks a declaration that certain Public Acts (described in paragraph 31 of each Count) which withheld cost-of-living adjustments due all judges (the Class) under the Ethics Reform Act are unconstitutional.

8. The claims of Plaintiffs in each Count are typical of the claims of the Class.

9. The named Plaintiffs, with their counsel, will fairly and adequately protect and represent the interests of the Class in each Count. The interests of the representative parties are coextensive with those of the Class.

10. As to each claim, the party opposing the Class (the United States) has acted and has refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the Class as a whole.

ARTICLE III, SEC. 1 AND THE STATUTES WHICH SET JUDGES' COMPENSATION

11. Article III, Section 1 of the Constitution of the United States provides, in pertinent part, that Judges of the United States Courts "shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." ("The Compensation Clause").

12. The Compensation of a Federal Judge is defined, in part, at 28 U.S.C., Section 135[2], which provides in pertinent part that "Each Judge . . . shall receive a salary at an annual rate determined under Section 225 of the Federal Salary Act of 1967 (2 U.S.C., Sections 351-361) as adjusted by Section 461 of this Title . . . " [28 U.S.C., Section 461] ("the Executive Salary Cost-of-Living Adjustment Act").

13. The Executive Salary Cost-of-Living Adjustment Act, as amended by the Ethics Reform Act of 1989 (Pub. L. 101-194, 103 Stat. 1716)[3] ("Ethics Reform Act"), requires that the salary of a Federal Judge shall be adjusted annually, pursuant to an index as set forth in the Ethics Reform Act. This adjustment is subject to only one condition: that there be, in the same fiscal year, an adjustment in the rates of pay of positions covered by the General Schedule under 5 U.S.C. Section 5303 ("the Comparability Act"). The Comparability Act is the mechanism for annually adjusting the rates of pay of most federal employees to reflect increases in the cost-of-living and salary increases in the private sector.

14. In adopting the Ethics Reform Act, Congress substantially revised the pay system for high-ranking government officials, including Judges. That Act (1) changed the method by which Judges' base salaries

---

[2] Section 135 defines the salary for District Court Judges. Similar provisions of Title 28 apply to Justices of the Supreme Court and other Article III Judges. *See* Section 5 (Justices of the Supreme Court), Section 44 (Circuit Courts of Appeals) and Section 252 (Court of International Trade).

[3] Codified at 5 U.S.C. Sec. 5318, note.

would be periodically reviewed by a Commission; (2) imposed severe limitations on the outside income Judges could earn and forbade the receipt of honoraria; and (3) provided a new mechanism for annual adjustments to Judges' pay. The Act provided that each judge would receive a base salary increase, effective January 1, 1991. It also provided for the restoration of cost-of-living adjustments which had been withheld in fiscal years 1989 and 1990. Relevant to the claims in this Complaint, the Act provided that, beginning in 1991 and in each subsequent year, the salary of a Federal Judge would be adjusted based on a specific schedule and index.

15. Under the new mechanism, in any year in which salaries of General Schedule employees are adjusted under the Comparability Act, Judges' salaries are to be adjusted by an amount equal to one-half of one percent less than the percentage change in the Employment Cost Index ("ECI") for the period having ended December 31 of the previous year. Ethics Reform Act, 704(a)(1)(B); 5 U.S.C., Sec. 5318, note. The statute further provides that the annual adjustment is to be limited to a maximum of 5 percent per year. Under the provisions of the Ethics Reform Act, mandatory ECI adjustments became part of each federal Judge's compensation when the Act was passed. (The annual adjustment under the new method mandated by the Ethics Reform Act is hereinafter referred to as the "ECI adjustment" or "COLA.")

16. Pursuant to the statutory scheme described in paragraphs 12 through 15 above, the compensation of Federal Judges includes the base salary (established by the Ethics Reform Act of 1989), adjusted annually by the

ECI adjustment as mandated under that Act. To paraphrase slightly the description of the Act by the United States Court of Appeals for the District of Columbia Circuit, "[t]he Ethics Reform Act of 1989 substantially revised the pay system for high-ranking government officials. . . . [T]he Act provided that each [Judge] would receive an immediate one-time salary increase and in subsequent years an annual COLA to his or her salary . . . " *Boehner v. Anderson*, 30 F.3d 156, 158 (D.C. Cir. 1994). Accordingly, "[i]t has been the law since 1989 that a COLA would be made on January 1, 1991 and each year thereafter pursuant to a specified formula," i.e. the ECI Index. (30 F.3d at 162).

17. The ECI adjustment for Judges is automatic. The only condition to the payment of an ECI adjustment, as provided in the Ethics Reform Act, is that there be an adjustment in the rates of pay for General Schedule employees under the Comparability Act.

18. By automatic operation of the ECI provision, Judges' salaries were adjusted the first day of January 1991, 1992 and 1993.

19. For Fiscal Year 1994, General Schedule salaries were not adjusted under the Comparability Act, and thus the statutory mechanism for the ECI adjustment of Judges' pay under the Ethics Reform Act was not triggered. As described below, no COLAs were paid to Judges in the years 1995, 1996 and 1997, despite the fact that in each of those years General Schedule salaries were adjusted under the Comparability Act.

20. Article III is designed to ensure the independence of the Judicial Branch and to place the Judicial

Branch beyond the reach and above the suspicion of any undue influence of the other two more political branches of government. Article III thus imposes upon Congress the duty to provide a compensation for Judges which achieves these objectives and to refrain from action which might undermine them.

21. The Ethics Reform Act established a system designed to protect Judges' compensation from loss due to inflation, providing that any time the salaries of the General Schedule federal work force are adjusted to compensate for increases in the cost-of-living, the salaries of Judges must also be adjusted. Since Article III of the Constitution imposes a duty upon Congress to refrain from taking any action relating to Judges' compensation which will undermine judicial independence, once Congress establishes a pay system designed to protect Judges' compensation from inflation, Congress may not take any action that prevents Judges from receiving the full compensation to which they otherwise would be entitled by operation of that pay system.

22. The basic purpose of an annual cost-of-living adjustment mechanism, such as that provided for under the Comparability Act and Ethics Reform Act, is to counter the effects of inflation which otherwise would reduce the real value of compensation. In determining whether to withhold payment of COLAs to members of Congress and political appointees holding high-level Executive Branch positions, Congress' decisions are necessarily influenced by political considerations not applicable to non-political career federal employees generally, and Judges in particular. The provisions of Article III which prohibit the diminution of judicial compensation and

guarantee life tenure are designed to insure that the Judiciary remains independent of the other two Branches. To classify Judges with Members of Congress and high-level political appointees, rather than other career federal employees, in determining whether to withhold COLAs which otherwise are payable by law, is contrary to the objectives of Article III and so constitutes an irrational classification which denies equal protection under the law as guaranteed by the Fifth Amendment of the Constitution.

SECTION 140 OF PUB. L. 97-92

* * *

COUNT I – FY 1995

1-27. Plaintiffs hereby reallege paragraphs 1 through 27 of this Complaint as paragraphs 1 through 27 of this Count I.

28. The Class in this Count I is comprised of all persons who served as Judges of the United States at any time during the period January 1 through December 31, 1995.

29. For Fiscal Year 1995, the salaries of General Schedule employees were adjusted under the Comparability Act. Accordingly, the salaries due Federal Judges under the Ethics Reform Act were also adjusted beginning January 1, 1995.

30. Notwithstanding the clear right of Federal Judges to be paid at the compensation levels prescribed by law during Fiscal Year 1995, the Defendant has refused to pay the full compensation due Judges.

31. The Defendant has refused to pay the full compensation due Judges because Congress adopted and the President signed the Treasury, Postal Service and General Government Appropriations Act of 1995 (Pub. L. No. 103-329, § 630, 108 Stat. 2382, 2424.) This enactment, which became effective when signed by the President on September 30, 1994, purported to repeal and rescind the previously-authorized adjustments payable to Federal Judges as mandated by the Ethics Reform Act. Although Pub. L. No. 103-329 recognized that the salary adjustments payable to General Schedule Employees under the Comparability Act had taken effect, it nonetheless provided that, for purposes of determining Judges' pay, "no adjustments under [the Comparability Act] shall be considered to have taken effect." This declaration, no matter what its intent, could not constitutionally repeal the adjustments, and thereby reduce the compensation, due Judges under the Ethics Reform Act.

COUNT II – FY 1996

* * *

COUNT III – FY 1997

* * *

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for the following relief:

A. That this Court find that this action and each count thereof is a proper class action and that the named parties adequately represent each Class.

B. That upon said findings, this Court order that the action may properly be maintained as a class action as each Class is defined by Plaintiffs in this Complaint.

* * *

D. That this Court declare that each of the Public Acts, as described in paragraph 31 of each Count of this Complaint, which withheld the ECI adjustments due Judges under the Ethics Reform Act violates the Compensation Clause, Article III, Section I of the Constitution and is therefore unconstitutional and void.

E. That this Court declare that Plaintiffs and the members of the Class in each Count are entitled to damages in an amount to be determined by the Court.

F. That this Court declare that Plaintiffs and the members of the Class in each Count are entitled to recover whatever interest would have been earned on any compensation wrongfully withheld.

G. That this Court enter judgment on behalf of Plaintiffs and the members of each Class as defined in each Count of the Complaint in an amount to be determined to be due by law.

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* * *

(5)

No. 01-175

NOV 2 2001

OFFICE OF THE CLERK

In the Supreme Court of the United States

SPENCER WILLIAMS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
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28P

QUESTIONS PRESENTED

Under the Ethics Reform Act of 1989, Pub. L. No. 101-194, § 704(a)(2)(A), 103 Stat. 1769, the salaries of federal judges, Members of Congress, and high-level Executive Branch officials are adjusted based on the Employment Cost Index (ECI) calculated by the Bureau of Labor Statistics. The adjustment commences on January 1, for any year in which the General Schedule salaries of other federal employees are also adjusted based on the ECI. In Fiscal Years 1995, 1996, 1997, and 1999, the salaries of General Schedule employees were adjusted based on the ECI, but Congress passed a law, before January 1, that disallowed the adjustment to judicial, congressional, and executive salaries. Petitioners, a class of federal judges, contend that Congress's disallowance of those salary adjustments violated the Compensation Clause of Article III, Section 1.

The questions presented are:

1. Whether, as a matter of statutory interpretation, judges were not entitled to automatic adjustment of their salaries in those four years because Pubic Law No. 97-92, § 140, 95 Stat. 1200, separately prohibits any increase in judicial salaries, "except as may be specifically authorized by Act of Congress hereafter enacted."

2. Whether the laws disallowing salary increases in those four years violated the Compensation Clause.

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In the Supreme Court of the United States

No. 01-175

SPENCER WILLIAMS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-99) is reported at 240 F.3d 1019. A separate opinion by the panel majority concurring in the full court's order denying hearing en banc (Pet. App. 163-164) is reported at 240 F.3d 1366. Separate opinions dissenting from the court's order denying hearing en banc (Pet. App. 151-162) are reported at 264 F.3d 1089. The initial decision of the district court granting summary judgment for petitioners (Pet. App. 103-131) is reported at 48 F. Supp. 2d 52. A subsequent decision of the district court granting judgment for petitioners in a related case (Pet. App. 144-148) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 2001. A petition for rehearing was denied on April 30, 2001. Pet. App. 165-166. The petition for a writ of certiorari was filed on July 27, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The salaries of federal judges are determined according to "an interlocking network of statutes." *United States* v. *Will*, 449 U.S. 200, 202 (1980). While some aspects of that network of laws have been altered since this Court's decision in *Will*, the system has not changed in certain fundamental respects. In essence, Congress has established statutory salaries for federal judges, and has also provided a formula for potential salary adjustments in each calendar year to account for increases in the cost of living and to attain comparability with private-sector salaries. Both before and after *Will*, Congress has connected annual adjustments in judicial salaries to adjustments in salaries of Members of Congress and high-level Executive Branch officials, and has also made such adjustments dependent on adjustments to the General Schedule salaries of other federal employees.

As this Court explained in *Will* (449 U.S. at 203-204), base judicial salaries were established by the Postal Revenue and Federal Salary Act of 1967 (Salary Act), Pub. L. No. 90-206, § 225, 81 Stat. 642. In 1975, Congress also provided for annual adjustments in the salaries of high-level government officials, including judges, in the Executive Salary Cost-of-Living Adjustment Act (Adjustment Act), Pub. L. No. 94-82, § 201, 89 Stat. 419. The Adjustment Act originally connected adjustments in those salaries to the overall average

percentage annual adjustment of the General Schedule pay rates for other federal employees' salaries made pursuant to the Federal Pay Comparability Act of 1970 (Comparability Act), 5 U.S.C. 5301 *et seq.* See 28 U.S.C. 461(a) (1976 & Supp. V 1981); 5 U.S.C. 5305 (1976 & Supp. V 1981).

Under the Comparability Act as initially framed, a presidential agent made annual recommendations for adjustments to federal employees' salaries to bring those salaries in line with prevailing rates in the private sector. The agent annually compared the General Schedule rates with the rates of pay for the same levels of work in the private sector, and then made recommendations to the President for adjustment of federal salaries based on those comparisons. See 5 U.S.C. 5305 (1976 & Supp. V 1981); *Will*, 449 U.S. at 204. The President then submitted to Congress a report either adopting the agent's recommendation or making a different recommendation for adjustments in federal employees' pay for the following fiscal year (beginning October 1). The President's recommendation took effect on October 1 absent congressional intervention. *Ibid.* The Adjustment Act made those salary adjustments applicable as well to the salaries of federal judges, commencing also on October 1. *Id.* at 205; see Pet. App. 28-29.

b. In *Will*, this Court considered a challenge under the Compensation Clause of Article III, Section 1 of the Constitution to legislation that blocked adjustments to judicial salaries under the Adjustment Act in four fiscal years.[1] As to two of the years involved (referred to as

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[1] The Compensation Clause provides: "The Judges, both of the supreme and inferior Courts, * * * shall, at stated Times, receive

Years 2 and 3 in *Will*), Congress enacted and the President signed the blocking legislation before October 1, the initial date of the fiscal year on which the Adjustment Act increases were to take effect. In the other two years (referred to as Years 1 and 4), Congress enacted the blocking legislation after the Adjustment Act increases took effect on October 1.

This Court upheld the blocking legislation for Years 2 and 3, but struck down the legislation for Years 1 and 4, which had been enacted after the increases took effect. As pertinent here, the Court rejected the contention that the blocking legislation for Years 2 and 3 "'diminishe[d]' compensation within the meaning of the Compensation Clause," or "reduce[d] the amount a judge * * * has been promised," in violation of the Compensation Clause. *Will*, 449 U.S. at 227. Rather, the Court explained, the enactments for Years 2 and 3 were "passed before the Adjustment Act increases had taken effect—before they had become a part of the compensation due Article III judges. Thus, the departure from the Adjustment Act policy in no sense diminished the compensation Article III judges were receiving; it refused only to apply a previously enacted formula." *Id.* at 228 (footnote omitted). Accordingly, the Court held that "Congress may, before the effective date of a salary increase, rescind such an increase scheduled to take effect at a later date." *Id.* at 226. The Court also rejected the district court's reasoning that, "by including an annual cost-of-living adjustment in the statutory definitions of the salaries of Article III judges, Congress made the annual adjustment, from that

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for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. Const. Art. III, § 1.

moment on, a part of the judges' compensation for constitutional purposes." *Id.* at 226-227 (citation omitted).

c. In response to the Court's ruling in *Will* that invalidated the blocking legislation for Years 1 and 4, Congress acted to ensure that judges' salaries would not thereafter be increased without affirmative congressional action. It did so by enacting Section 140 of Public Law No. 97-92 (a joint resolution providing appropriations for the operations of the federal government). Section 140 provides in relevant part:

> Notwithstanding any other provision of law or of this joint resolution, none of the funds appropriated by this joint resolution or by any other Act shall be obligated or expended to increase, after the date of enactment of this joint resolution, any salary of any Federal judge or Justice of the Supreme Court, except as may be specifically authorized by Act of Congress hereafter enacted.

95 Stat. 1200. The appropriations made under Public Law No. 97-92 originaliy were to expire on March 31, 1982, but were extended until September 30, 1982. See Pub. L. No. 97-92, § 102(c), 95 Stat. 1193; Pub. L. No. 97-161, 96 Stat. 22.

Although the appropriations made by Public Law No. 97-92 terminated upon that law's expiration, Congress has consistently acted on the understanding that Section 140's prohibition against adjustment of judicial salaries without specific authorization in a separate Act of Congress was permanent substantive legislation that survived the expiration of the provisions of the joint resolution that appropriated funds. Thus, in fiscal years in which federal judges received salary adjustments under the Salary Act and the Comparability Act, Congress has passed a law separately authorizing those ad-

justments, expressly providing that "[p]ursuant to section 140 of Public Law 97-92, Justices and judges of the United States are authorized * * * to receive a salary adjustment in accordance with 28 U.S.C. section 461." See Pet. App. 9.

d. The Ethics Reform Act of 1989 (Ethics Reform Act), Pub. L. No. 101-194, 103 Stat. 1716, comprehensively addressed the compensation of federal judges and Members of Congress. Congress generally barred judges and Members of Congress from receiving honoraria and limited their receipt of other outside income. See Pet. App. 169-170; Ethics Reform Act § 501, 103 Stat. 1760-1762; 5 U.S.C. App. §§ 501-502. Congress also provided for a one-time 25% increase in judges' salaries. See Pet. App. 3, 172; Ethics Reform Act § 703(a)(3), 103 Stat. 1768.

The Ethics Reform Act also reconfigured the mechanism for annual adjustments to judges' salaries under the Compensation Act and the Adjustment Act. Based on a recommendation of a bipartisan task force on ethics, see 135 Cong. Rec. 30,753 (1989), Congress provided that the salaries of federal judges, Members of Congress, and high-level Executive Branch officials would receive an annual adjustment equal to the percentage change in the Employment Cost Index (ECI) —"a quarterly index of wages and salaries for private industry workers published by the Bureau of Labor Statistics" (*ibid.*)—minus 0.5%. See Ethics Reform Act § 704(a)(2)(A), 103 Stat. 1769. The adjustment to judicial salaries takes effect as of January 1. See 28 U.S.C. 461(a) (adjustment to judges' salaries tied to pay period in which adjustments to General Schedule salaries take effect); 5 U.S.C. 5303(a) (General Schedule salary adjustments take effect for pay period beginning on or after January 1 of each calendar year).

The use of the ECI for adjustments to judicial, congressional, and high-level executive salaries departed from the previous mechanism for adjusting General Schedule salaries, which had turned on the recommendation of the President's agent. See p. 3, *supra*. Congress did not, however, fully disconnect adjustments to judicial salaries from adjustments to federal employees' salaries. Under the Ethics Reform Act, a precondition for an annual adjustment in judges' salaries is that the salaries of General Schedule employees also receive a comparability adjustment for the same year. See § 704(a)(2)(A), 103 Stat. 1769. Thus, if Congress enacts a law to prevent a comparability adjustment to the salaries of other federal employees for any particular year, judges also do not receive any such adjustment for that year. Moreover, Congress promptly made the two adjustment mechanisms still further related when it enacted the Federal Employees Pay Comparability Act of 1990 (FEPCA), Pub. L. No. 101-509, § 529, 104 Stat. 1427. The FEPCA extended to General Schedule salaries the mechanism for adjustment based on the annual percentage change in the ECI. See 104 Stat. 1430 (enacting new 5 U.S.C. 5303)).[2]

e. Congress has in some years permitted and in some years denied salary adjustments for its own Members, for high-level Executive Branch employees, and for federal judges. In 1991, Congress increased federal judges' pay twice. First, in accordance with Section 703(a) of the Ethics Reform Act (see p. 6, *supra*), Congress increased the rate of basic pay for all federal

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[2] The ECI-based adjustment to General Schedule salaries, however, is not subject to the 5% cap on adjustment to judicial, congressional, and high-level executive salaries imposed by the Ethics Reform Act § 704(a)(1), 103 Stat. 1769; cf. 5 U.S.C. 5303(a).

judges by approximately 25%. Second, because General Schedule salaries were increased under the Comparability Act for 1991, judges also received an additional pay adjustment for 1991.

In 1992 and 1993, General Schedule rates of pay were again increased under the Comparability Act. Therefore, the Adjustment Act, as amended, provided for adjustments for federal judges' salaries in those years. Pet. App. 3-4. To satisfy the requirements of Section 140 of Public Law No. 97-92, Congress enacted laws specifically authorizing federal judges to receive those adjustments. See Pub. L. No. 102-140, § 305, 105 Stat. 810;[3] Pub. L. No. 102-395, § 304, 106 Stat. 1859.[4] For 1994, Congress enacted legislation cancelling any increases in General Schedule rates of pay under the Comparability Act. Pub. L. No. 103-123, § 517A, 107 Stat. 1253. Consequently, like other federal employees, federal judges did not receive any pay adjustment that year.

For 1995, 1996, 1997, and 1999, General Schedule rates of pay were increased under the Comparability Act. For each of those years, however, before the beginning of the calendar year when any adjustment to federal judges' rates of pay would have become effective, Congress enacted a law preventing any increase in the rates of pay for Members of Congress, high-ranking Executive Branch officials, and federal judges from

[3] Public Law No. 102-140 provided: "Pursuant to section 140 of Public Law No. 97-92, Justices and judges of the United States are authorized during fiscal year 1992, to receive a salary adjustment in accordance with 28 U.S.C. 461."

[4] Public Law No. 102-395 provided: "Pursuant to section 140 of Public Law No. 97-92, Justices and judges of the United States are authorized during fiscal year 1993, to receive a salary adjustment in accordance with 28 U.S.C. 461."

taking effect. See Pub. L. No. 103-329, § 630, 108 Stat. 2424; Pub. L. No. 104-52, § 633, 109 Stat. 507; Pub. L. No. 104-208, § 637, 110 Stat. 3009-364; Pub. L. No. 105-277, § 621, 112 Stat. 2681-518. Thus, in each of those years, Congress by law prevented an otherwise scheduled cost-of-living increase from taking effect before the judges performed any service that would have entitled them to compensation. In addition, Congress did not enact any law for 1995, 1996, 1997, or 1999, specifically authorizing any adjustment in federal judges' salaries, as required by Section 140.

For fiscal year 1998, General Schedule rates of pay were again increased under the Comparability Act, and the Adjustment Act therefore provided for a pay adjustment for federal judges. Congress did not bar that increase, and it enacted a law under Section 140 specifically authorizing federal judges to receive the adjustment for 1998. Pub. L. No. 105-119, § 306, 111 Stat. 2493.

2. In 1997, petitioners brought suit on behalf of themselves and a class of similarly situated Article III judges, arguing that Congress violated the Compensation Clause by preventing salary increases for judges from going into effect in 1995, 1996, 1997, and 1999. Petitioners asserted that they acquired a constitutional right to receive cost-of-living increases for those years in 1989, when Congress passed the Ethics Reform Act and thereby created a formula for future automatic increases. The government argued, first, that judges had no statutory right to automatic salary increases because of Section 140 of Public Law No. 97-92, which prohibits adjustments to judicial salaries without affirmative congressional legislation; and second, that the laws blocking adjustment to judicial salaries in each of the four years were constitutional under *Will*, which

sustained similar laws blocking judicial salary increases before the dates on which those adjustments were to go into effect.

The district court granted summary judgment for petitioners.[5] The district court concluded that judicial salary increases "vested on the date of the enactment of the [Ethics Reform Act of 1989] conditioned only on adjustments being granted to General Schedule employees." Pet. App. 118. The court therefore rejected the government's argument that any salary increase for judges actually vests, for purposes of the Compensation Clause, only when judges begin to earn the salary (by performing judicial service for the period in which the salary is owing) or receive its benefits. Rather, the court reasoned, "the ECI adjustments became part of the judges' compensation due and payable to the judges when the Ethics Reform Act became law [in 1989]." *Id.* at 121.

The district court also held that Section 140 of Public Law No. 97-92 does not govern judicial pay increases because, despite Congress's many citations to it in legislation in the 1990s, Section 140 expired in 1982. Pet. App. 127. The court also held, in the alternative, that

[5] The district judge noted that, although his own salary was potentially affected by the outcome of this case, the same was true of every other Article III judge as well. Thus, the court concluded, there is no Article III judge who does not have an interest in the case, and the Rule of Necessity permitted the district judge to rule on the case. See Pet. App. 106-107. The court of appeals agreed, *id.* at 7-8, and so do we. See *Will*, 449 U.S. at 214-217. In particular, we note that the case could not have been transferred to a judge in senior status because the salaries of senior judges are also adjusted pursuant to the Adjustment Act. See 28 U.S.C. 371(b)(2) (salaries of senior judges "shall be adjusted under section 461 of this title").

Section 140 was implicitly repealed by the Ethics Reform Act in 1989. *Id.* at 128-131.

3. a. A divided panel of the court of appeals reversed. Pet. App. 1-41. Although the court of appeals agreed with the district court that Section 140 had expired and therefore did not require affirmative congressional legislation to authorize a judicial salary adjustment, *id.* at 8-11, it held that the constitutionality of the laws blocking judicial salaries for the years in question was directly controlled by this Court's decision in *Will* sustaining similar blocking laws for Years 2 and 3. See *id.* at 22-30.

The court rejected petitioners' argument that the system for adjustments to judicial salaries established by the Ethics Reform Act of 1989 differed substantially from the pay-raise system discussed in *Will* and for that reason justified a different answer to the constitutional question. Pet. App. 22-30. In particular, the court rejected the contention that judges' entitlement to automatic salary increases under the current system "vested" for purposes of the Compensation Clause in 1989, when Congress enacted the Ethics Reform Act, whereas judges' entitlement to adjustments in the scheme reviewed in *Will* did not vest until the salary increases actually became effective on October 1. To the contrary, the court discerned that this Court's decision in *Will* "established a 'vesting' rule for Article III that is exclusively focused on whether the pay adjustments have become 'part of the compensation due and payable' to judges," *id.* at 23 (quoting *Will*, 449 U.S. at 229), and that the Ethics Reform Act of 1989 "did *not*, for Article III purposes, 'vest' the judges with any pay increases," *id.* at 25. The court also stressed that, in pertinent respects, the current system is not fundamentally different from the one reviewed in *Will*, be-

cause under both mechanisms, if the salaries of federal employees were to be adjusted for the year in question, adjustments to judicial salaries would also automatically take effect on the pertinent date unless Congress took affirmative action blocking the adjustments. *Id.* at 29. Thus, the court found it "impossible to distinguish the statutory scheme implemented in 1989, for purposes of application of the Article III compensation vesting rule laid down in *Will*." *Id.* at 30.

b. Judge Plager dissented. Pet. App. 42-99. In his view, the Ethics Reform Act was intended to guarantee judges automatic salary increases whenever the salaries of other federal employees were adjusted, and that guarantee was made part of the statutory definition of judges' compensation, which could not be constitutionally diminished. *Id.* at 80-85.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Section 140 of Public Law No. 97-92 independently supports the judgment below because it requires affirmative action by Congress through the passage of a new law to adjust judicial salaries, and no such law was enacted for the years in question. In addition, the court of appeals correctly ruled that the constitutionality of the congressional blocking laws challenged in this case is directly controlled by this Court's decision in *Will*. Finally, there is no merit to petitioners' contention that the challenged blocking laws impermissibly discriminated against federal judges.

1. Section 140 of Public Law No. 97-92 provides in pertinent part:

> Notwithstanding any other provision of law or of this joint resolution, none of the funds appropriated by this joint resolution *or by any other Act* shall be obligated or expended to increase, *after the date of enactment of this joint resolution*, any salary of any Federal judge or Justice of the Supreme Court, *except as may be specifically authorized by Act of Congress hereafter enacted.*

95 Stat. 1200 (emphasis added). The plain import of Section 140 is that no federal funds shall be expended to increase judicial salaries except as specifically authorized by Congress. No such law containing a specific authorization was passed by Congress for the years at issue in this case. Accordingly, petitioners are not entitled to receive any adjustment to their salaries for those years.

The court of appeals held that Section 140, which was part of a joint resolution authorizing continuing appropriations for federal programs, ceased to be effective after expiration of the period for which the appropriations were made. The court evidently relied on a presumption of statutory construction that, because an appropriation act is made for a particular fiscal year, everything contained in that act is effective only for the fiscal year covered. See Pet. App. 10-11; see also General Accounting Office, *Principles of Federal Appropriations Law* 2-29 (2d ed. 1991). That presumption, however, may be overcome when the "language used * * * or the nature of the provision makes it clear that Congress intended it to be permanent." *Ibid.*

Section 140 contains two indicators that Congress intended it to have effect beyond the period covered by

the continuing appropriations. First, Section 140 specifically provides that none of the funds appropriated by that law or by any other Act passed *after its enactment* may be used for judicial salary increases without express authorization by Congress. Second, Section 140 also specifically provides that adjustments to judicial salaries are prohibited "except as may be specifically authorized by Act of Congress hereafter enacted." As the Comptroller General has explained in concluding that Section 140 remains in effect (see Pet. App. 123-125), at the time Section 140 was enacted, judges' salaries were not scheduled for adjustment under the Adjustment and Comparability Acts until the beginning of the following fiscal year, after the appropriations in Public Law No. 97-92 were scheduled to expire. Thus, Congress's references in Section 140 to appropriations made under "any other Act" and to authorizations for salary increases under laws "hereafter enacted" were obviously directed to the possibility of a salary adjustment made *after* the appropriations in Public Law No. 97-92 expired, and so Section 140's prohibition is most sensibly understood to apply after that expiration as well.

Furthermore, against the background of the Comptroller General's repeated opinions in the 1980s concluding that Section 140 remains in effect, Congress has since consistently acted under the same understanding. Congress enacted laws specifically authorizing judicial salary increases for each year in which judges have received such increases, and in doing so, Congress expressly provided in the text of each of those laws that the adjustments were authorized "[p]ursuant to section 140 of Public Law No. 97-92." See Pet. App. 9. Thus, even if Section 140, standing alone, were thought to be ambiguous on the question, those subsequent enact-

ments constitute a declaration and ratification by Congress of the continuing force of Section 140. See *United States* v. *Alaska*, 521 U.S. 1, 44 (1997).

Contrary to the court of appeals' conclusion (Pet. App. 11), the provisions of the Ethics Reform Act of 1989 establishing a mechanism for adjustments to judicial salaries are not a law "hereafter enacted" within the meaning of Section 140. When Congress has specifically, authorized judicial salary increases, it has made express reference to Section 140. The Ethics Reform Act's general mechanisms for judicial salary adjustments make no such reference, however, just as the pre-existing network of laws providing for judicial salary adjustments made no such reference. By contrast, when Congress acted in the Ethics Reform Act to restore comparability adjustments to federal officers' and employees' salaries (including judicial salaries) that had been blocked or limited in previous years, it expressly stated that those adjustments were authorized for purposes of Section 140. See Ethics Reform Act § 702(c), 103 Stat. 1768. Accordingly, in the Ethics Reform Act itself, Congress recognized that Section 140 was still operative, but gave no indication that the Ethics Reform Act's provisions establishing a mechanism for judicial salary adjustments in future years, standing by themselves, were sufficient to satisfy Section 140's requirement of express authorization for judicial salary increases. And as we have explained, Congress thereafter acted in those future years on the understanding that Section 140 is still in effect, for it specifically authorized each pay increase for judges that occurred after enactment of the Ethics Reform Act pursuant to Section 140.

2. The court of appeals correctly concluded in any event that this Court's decision in *Will* requires rejec-

tion of petitioners' Compensation Clause claims. Pet. App. 2. *Will* established "a clear and simple rule for determining whether the repeal of a statutorily-mandated judicial pay increase runs afoul of Article III" (*id.* at 16): Congress may repeal an anticipated salary increase for federal judges at any time before that increase "vests" for purposes of the Compensation Clause, and "a salary increase 'vests' for purposes of the Compensation Clause only when it takes effect as part of the compensation *due and payable* to Article III judges." 449 U.S. at 228-229 (emphasis added). That rule is based on the text of the Compensation Clause itself, which provides that judges "shall, at stated Times, *receive* for their Salaries, a Compensation, which shall not be *diminished* during their Continuance in Office." U.S. Const. Art. III, § 1 (emphasis added). A judge's compensation is not "diminished" unless it is reduced from the compensation that the judge previously "receive[d]." Thus, even if one Act of Congress adopts a formula providing for judges to receive salary increases in the future, the passage of another Act of Congress to disallow those salary increases before they take effect does not "diminish[]" judges' compensation within the meaning of the Clause.[6]

[6] Although a salary increase takes effect on January 1 of a particular year, judges are not paid the salary for that month (including the increase beginning as of January 1) until that month is completed. Under *Will*, however, the operative date of the salary increase for purposes of the Compensation Clause is the date on which the judges begin to render services that are subject to the increased compensation (now, January 1)—*i.e.*, the date as of which the increased compensation becomes "due and payable," 449 U.S. at 229—not the date on which the judges are actually paid for those services. That is the point made in the passages quoted by petitioners (Pet. 25-26) from the Solicitor General's brief in *Will*.

The court of appeals correctly applied the constitutional rule laid down in *Will* to the facts of this case. All of the blocking statutes at issue in this case were enacted before the judicial pay increases became "due and payable" (*Will*, 449 U.S. at 229) on January 1 of the pertinent year. See Pet. App. 21. Accordingly, those blocking statutes did not "diminish" judges' preexisting compensation.

Petitioners' attempts to distinguish the judicial compensation scheme at issue in this case from the blocking statutes upheld in *Will* are without merit. While the two schemes are not identical, they are fundamentally similar in that each authorized an adjustment to judicial salaries as of a date certain, without the need for further congressional action, in any year in which other federal employees received salary adjustments. See Pet. 20 (noting that, under the scheme reviewed in *Will*, "[t]he President's plan [for comparability adjustments] would become law unless it was vetoed by either House of Congress within thirty days").[7] The court of appeals was thus correct in finding it "impossible to distinguish the statutory scheme implemented in 1989, for purposes of application of the Article III compensation vesting rule laid down in *Will*." Pet. App. 30.

Petitioners point out (Pet. 12) that, in property law, the concept of "vesting" is used to describe a future interest that has become protectible under the law. The Court's decision in *Will*, however, did not use the term "vest" in that technical sense, based on arcane principles governing future interests. To the contrary, the Court plainly used the word "vest" in *Will* as a

[7] The legislative-veto aspect of the Comparability Act was removed when Congress enacted the FEPCA in 1990. See p. 7, *supra*.

shorthand to state the constitutional rule that judicial salary increases become irrevocable only once they take effect. See *Will*, 449 U.S. at 221 ("We must decide when a salary increase authorized by Congress under such a [previously enacted] formula 'vests'—*i.e.*, becomes irreversible under the Compensation Clause. Is the protection of the clause first invoked when the formula is *enacted* or when it *takes effect*?"); *id.* at 229 ("[A] salary increase 'vests' for purposes of the Compensation Clause only when it takes effect."). Indeed, the Court expressly rejected the contention that "Congress could not alter a method of calculating salaries before it was executed," because such a ruling would mean that "the Judicial Branch could command Congress to carry out an announced future intent as to a decision the Constitution vests exclusively in the Congress." *Will*, 449 U.S. at 228. Thus, when Congress enacted laws preventing each of the salary increases at issue in this case from going into effect, it "in no sense diminished the compensation Article III judges were receiving; it refused only to apply a previously enacted formula." *Ibid.*[8]

[8] Petitioners suggest (Pet. 13) that the Court's reference in *Will* to "an announced future intent" on the part of Congress that judicial salaries would be increased signified Congress's intent to enact a law in the future. That reading of *Will* is simply incorrect. Under the statutory scheme in *Will*, federal judges were to receive a salary increase in any year in which General Schedule salaries were increased, barring congressional intervention. See pp. 2-3, *supra*. That was Congress's "announced future intent" when it enacted the Comparability Act in 1975. Similarly, when Congress enacted the Ethics Reform Act, it announced its future intent that judges receive a salary increase based on the ECI in any year in which General Schedule salaries were adjusted. Nonetheless, Congress remains free to prevent such judicial salary increases from taking effect before January 1 of the year in question, just as this Court concluded in *Will* that it was free to prevent the adjustments from taking effect before October 1.

Petitioners do not dispute that Congress could repeal entirely the mechanism for adjustment of judicial salaries, and that Congress could prevent any adjustment from going into effect by preventing a comparability adjustment for General Schedule employees. There is no basis for a constitutional rule that distinguishes those situations from the case in which Congress allows an adjustment to General Schedule salaries but disallows one for judicial, congressional, and high-level executive salaries before the adjustment takes effect. Petitioners argue (Pet. 13) that the adjustments authorized by the Ethics Reform Act are fundamentally different because they were enacted as part of a "bargain" by which federal judges agreed to forgo sources of outside income such as honoraria. But the Ethics Reform Act was not a contract between Congress and individual members of the federal judiciary; it was an exercise of Congress's authority, assigned to it by Article III of the Constitution, to establish the level of judicial compensation. Whether or not Congress's decision in subsequent years to disallow judicial salary increases was good policy, it did not "diminish[]" judges' compensation in the constitutional sense.

Nothing in *United States* v. *Hatter*, 121 S. Ct. 1782 (2001), calls into question the court of appeals' decision. In *Hatter*, the Court addressed whether extension of an existing tax to the federal judiciary for the first time unconstitutionally diminished judges' compensation. The principal issue in *Hatter* was whether only a reduction in judges' salaries as stated in law could "diminish" their "Compensation" within the meaning of Article III, or whether certain forms of taxation could also be held

to constitute such a diminution. See *id.* at 1795. In this case, however, taxation is not at issue, and there has been no reduction in judges' stated legal salary. Rather, Congress merely stopped a planned increase in judges' salaries from going into effect by passing a law that barred the increase. Thus, Congress declined to allow a raise in judicial compensation, but did not diminish that compensation, either directly or indirectly. Congress is under no constitutional obligation to increase judges' salaries, and its enactment of a law to prevent an increase from occurring under a previously enacted law therefore does not implicate the Compensation Clause. See *Will*, 449 U.S. at 228.

Petitioners' reliance (Pet. 22-23) on the District of Columbia Circuit's decision in *Boehner* v. *Anderson*, 30 F.3d 156 (1994), is also misplaced. In *Boehner*, the court held that the Ethics Reform Act's provision for congressional salary adjustments (unless disallowed by Act of Congress) in any year in which General Schedule salaries are adjusted does not contravene the Twenty-Seventh Amendment, which provides that "[n]o law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened." U.S. Const. Amend. XXVII. *Boehner* rejected the contention that each congressional salary increase may be effectuated only by a new "law" enacted pursuant to the constitutionally prescribed procedures in Article I for enacting a law, and also held that Congress may constitutionally provide for an increase in congressional pay for years in the future (whether by specifying salaries or providing an indexing formula), as long as an election of Representatives intervenes between enactment of the law providing for such increases and the subsequent increases themselves. 30 F.3d at 160-161.

Boehner thus involved a completely different question from the one presented here; and, contrary to petitioners' submission (Pet. 23), *Boehner* did not hold that the salary increases specified by the Ethics Reform Act were "chiseled in stone," in the sense that they could not be stopped by legislation before they took effect.

3. Finally, petitioners' contention that the blocking statutes discriminated against federal judges is without merit. As petitioners acknowledge (Pet. 29), those statutes affected not only the salaries of federal judges, but also the compensation of Members of Congress and high-level Executive Branch officials. When Congress changed the pay scheme in the Ethics Reform Act of 1989, it intended to maintain salary parity among those three groups. See 135 Cong. Rec. at 30,753, 30,756 (recommendation of bipartisan task force on ethics, to the effect that rates of pay for Members of Congress, district judges, and Executive Schedule Level II offficers should be the same). Congress is entitled to treat those three groups of highly responsible federal officials differently from the great majority of other federal employees. Under petitioners' arguments, however, Congress would have been required to allow salary increases for all federal judges to go into effect even as it permissibly prevented such increases from taking effect for the Vice President and Members of the Cabinet. Indeed, if petitioners' claim were upheld, then all district judges would be paid more than Members of Congress and about the same as Cabinet Secretaries, and circuit judges would earn more than any officers in the Executive Branch except the President and the Vice President. See 28 U.S.C. 5, 44(d), 135, and 252. Contrary to petitioners' claim, however, maintenance of salary parity among the top-level officials of the

government is manifestly not discrimination against the federal judiciary.

The Court's decision in *Hatter* is not to the contrary. In *Hatter*, the Court concluded that Congress had impermissibly discriminated against federal judges when it extended social security taxes to all federal officers and employees, but simultaneously allowed all officers and employees except federal judges (and the President) to escape the effective incidence of the tax. See 121 S. Ct. at 1788-1789, 1793-1795. The tax invalidated in *Hatter*, however, effectively diminished judges' net take-home pay, and therefore fell within a broad understanding of a constitutional diminution of judges' compensation. See *id.* at 1793 (noting that "[t]he new law imposed a substantial cost on federal judges with little or no expectation of substantial benefit for most of them"). Congress's failure to allow salary increases to take effect, however, does not amount to a "substantial cost" in the sense used in *Hatter*, namely, an actual deduction from judges' salary checks (*ibid.*).

Moreover, the tax invalidated in *Will* was discriminatory because it treated federal judges differently from even other high-level officials, such as Cabinet secretaries and Members of Congress, who were allowed to escape the incidence of the tax. See 121 S. Ct. at 1788, 1796. It did so, moreover, precisely because of what the Court perceived to be a constitutionally protected feature of judges' compensation for their current service—their statutory entitlement to receive undiminished retirement pay for that service. See *id.* at 1794.[9]

[9] Contrary to petitioners' contention (Pet. 10-11), the logic of our position does not lead to the conclusion that retirement benefits that are measured by a judge's salary at the time of retirement can be eliminated altogether at any time before the judge retires. A statutory provision for the receipt of benefits after retirement may be regarded as a deferred portion of a judge's *current* compensation for *current* services that cannot thereafter be "diminished." It could not reasonably be contended, however, that a statutory provision for increases in *future* compensation for *future* services—which necessarily are contingent upon Congress's failure to enact a law abrogating any such increases before they take effect—is part of a judge's *current* compensation for *current* services within the meaning of the Compensation Clause.

Congress's failure to allow adjustments to judicial, congressional, and executive salaries in the years in question in this case does not operate in any similar fashion, and therefore works no discrimination against federal judges.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Supreme Court, U.S.
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No. 01-175

In The

Supreme Court of the United States

SPENCER WILLIAMS, LOUIS C. BECHTLE, SANDRA S. BECKWITH, WILLIAM MATTHEW BYRNE, JR., ADRIAN G. DUPLANTIER, MORRIS E. LASKER, THOMAS COLLIER PLATT, JR., JOHN W. REYNOLDS, WALTER HERBERT RICE, MARVIN H. SHOOB, JOSEPH L. TAURO, LAUGHLIN E. WATERS, LEE R. WEST AND HENRY RUPERT WILHOIT, JR.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

REPLY BRIEF

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REPLY BRIEF

Petitioners respectfully submit this reply brief to address new points raised by the government in its brief in opposition to the petition for writ of certiorari.

INTRODUCTION

Usually the party opposing certiorari argues that the Court should deny review because the lower court correctly decided the case. Here, the government argues that the court of appeals was wrong in its interpretation of Section 140 of Public Law 97-92. (Bf. Opp., pp. 13-15). It asks this Court, nevertheless, to deny certiorari, which would leave the claimed error in force.

With respect to the central constitutional issue, the judges of the court of appeals were unanimous in their interpretation of the Ethics Reform Act and the intent of the 101st Congress in enacting that statute: the Act was intended to construct a system of compensation that included "irreversible" annual COLAs for judges. (*See* Pet., p. 6). The majority determined, however, that under its interpretation of *United States v. Will*, 449 U.S. 200 (1980), no Congress has the power to irreversibly fix future salaries or benefits for judges, even if it does so to preserve the quality and independence of the judiciary.

The panel majority recognized that, in each year at issue, the judicial salary adjustments had "become payable," Congress having determined that COLAs would be paid to General Schedule employees. (*See* Pet., p. 23). The majority held, nevertheless, that those "payable" salary adjustments could be revoked without violating the Compensation Clause so long as Congress acted to revoke them before the COLAs were actually received by judges.

In its brief in opposition, the government takes a different approach than the court of appeals. It argues that no judicial salary adjustment is constitutionally protected until judges have rendered some services under

the adjusted pay rates. (Bf. Opp., p. 16 n.6). The government's resort to this "services rendered" argument further demonstrates the importance of this case and the urgent need for review of these issues by this Court.

ARGUMENT

I. SECTION 140 DOES NOT PREVENT PAYMENT OF JUDGES' COLAS.

The government's first argument (Bf. Opp., pp. 13-15) is that a one paragraph provision of a FY 1982 appropriations resolution, Pub. L. No. 97-92, § 140, 94 Stat. 1200 (1981), governing the use of funds for that year, is permanent law and requires a separate legislative enactment to authorize any salary adjustment for judges, even the COLAs specifically provided for under the Ethics Reform Act.

Section 140 provided that no increase in judges' salaries could take effect without authorization by a statute "hereinafter enacted." The district court and a unanimous court of appeals held that Section 140 did not apply to bar the increases at issue here for two separate reasons: (1) Section 140 expired by its own terms in 1982; and (2) even if Section 140 survived, the Ethics Reform Act was a statute "hereinafter enacted" and, thus, it provided the authorization required by Section 140. (App. 122-30, 8-11, 90-99).[1]

1. Section 140 was a part of a continuing appropriations resolution (Pub. L. 97-92) that expired by its own

[1] There is still a third reason why Section 140 cannot bar petitioners' claims. If Section 140 does apply to judges' COLAs, judges are the only federal employees who are not entitled to receive annual COLAs. This discriminatory application would render Section 140 unconstitutional. *See Hatter v. United States*, 121 S. Ct. 1782 (2001).

terms on September 30, 1982.[2] (*See* App. 8-9). The court of appeals explained that, despite its reference to later enacted statutes, Section 140 did not have the markings of permanency sufficient to overcome its clearly stated termination date. (App. 8-10, 90-99).

The government argues that Section 140 must have been intended to be permanent because of its reference to any act passed "after its enactment" and its prohibition of judicial salary adjustments other than those authorized by Act of Congress "hereinafter enacted." (Bf. Opp., p. 14). The government argues that, since judicial salaries were not scheduled to be adjusted until the beginning of the next fiscal year (after Pub. L. 97-92 expired), Congress must have intended Section 140 to survive the clear termination date, or it would have served no purpose.

The court of appeals considered and rejected this argument. (App. 11, 95-98). Contrary to the government's assumptions, there was a possibility of adjustments to judges' salaries before the scheduled termination date of Pub. L. 97-92 and, therefore, Section 140's requirements would have applied to these increases.

The court of appeals also properly rejected the argument that the intent of the 1981 Congress may be discerned from the actions of later Congresses in adopting Section 140 resolutions in subsequent years. (App. 9-10).

2. Section 140 allows for increases authorized by statute "hereinafter enacted." Section 704 of the Ethics Reform Act constituted that authorization. (App. 173-75). According to the government, even though the Ethics Reform Act mandates the payment of COLAs, an additional statute must be passed each year to authorize each

[2] Pub. L. 97-92 expired on March 31, 1982, but its provisions were extended to September 30, 1982, by Pub. L. No. 97-161, 96 Stat. 22 (1982).

adjustment in judges' salaries. In other words, unlike for members of Congress and executive level officers, there is no automatic COLA for judges. The government does not explain why judges were included in Section 704 if a separate statute must still be passed to authorize any adjustments for judges.[3] Moreover, if judges were not entitled to automatic COLAs under Section 704 without separate Section 140 authorization, it would not have been necessary to enact the statutes challenged here that purported to block payment of judicial salary adjustments.

The government's Section 140 arguments are based on a critical faulty premise. The government argues that, since there has been no increase in judicial salaries under the Ethics Reform Act without specific Section 140 approval, subsequent Congresses must have believed that Section 704 did not constitute an "Act of Congress hereinafter enacted" for purposes of Section 140. Petitioners disagree with the government's conclusion. But, more important, the premise on which it relies is in error.[4] There *have been* judicial salary increases based on the authority of the Ethics Reform Act alone and without reference to Section 140.

The Ethics Reform Act provided three separate salary increases for judges:

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[3] The government contradicts itself when it argues later in its brief that the Ethics Reform Act "authorized an adjustment to judicial salaries . . . *without the need for further congressional action* . . . ." (Bf. Opp., p. 17 (emphasis supplied)).

[4] The government made the same error in the court of appeals and corrected the error. (*See* Motion of Appellant To Correct A Misstatement In Its Briefs (Reply App. 1-2), and Response To The Motion Of Appellant To Correct A Misstatement In Its Briefs (*id.* at 3-5)).

- Section 702 of the Act restored cost-of-living adjustments, payable under the prior law, for 1988 and 1989. Pub. L. No. 101-194, § 702, 103 Stat. 1767-68 (1989). Section 702 contained a specific waiver of Section 140 for these prior law increases.[5]
- Section 703 of the Act provided for a 25% increase in salaries effective January 1, 1991. (App. 171-72). There was no waiver of Section 140 in Section 703 and no subsequent Section 140 resolution was passed. The 25% increase was paid on January 1, 1991.
- Section 704 of the Act provided for payment of annual cost-of-living adjustments. (App. 173-75). Section 704, like Section 703, took effect on January 1, 1991. Again, there is no mention of Section 140.

The failure to mention Section 140 in Section 704, like the failure to mention Section 140 in Section 703 and the payment of the 25% increase authorized therein, is conclusive proof that no further authorization was required for cost-of-living adjustments provided for under the Act.

Petitioners respectfully submit that the viability of Section 140 is not an issue and need not be addressed in any review of this case. We urge the Court to limit its review to the constitutional issues raised in the petition for certiorari. If, however, the Court believes Section 140 is an issue, the issue should not negatively impact petitioners' claim without a review of the entire case by this Court.

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[5] Some members of Congress may have assumed that Section 140 did apply to payments for the pre-Ethics Reform Act years.

II. THE GOVERNMENT'S OTHER ARGUMENTS DEMONSTRATE THE NEED FOR REVIEW.

The government's opposition raises additional points to which petitioners briefly respond *seriatim*.

1. There is no prior "services rendered" requirement in Article III. In the court of appeals the government argued that this Court's decision in *United States v. Will*, 449 U.S. 200 (1980), holds that some service must be rendered by judges under the adjusted pay rate before a COLA vests.[6] The government offered little support for this contention and none of the opinions of the court of appeals addressed the argument. The government asserts the argument again here, however.

The government apparently recognizes that, under the panel majority's "not protected until received" rationale, any element of compensation to be received in the future, even judges' retirement benefits, can be revoked at any time before the judges' actual receipt of those benefits. (*See* Pet., p. 10). Resort to its "services rendered" argument allows the government to argue that retirement benefits are safe from reduction because those benefits "may be regarded as a deferred portion of a judge's *current* compensation for *current* services that cannot hereafter be 'diminished'." (Bf. Opp., pp. 22-23 n.9 (emphasis in original)). The court of appeals did not adopt the "services rendered" rationale, and the rationale it did adopt leaves no room for debate: judges' retirement benefits, like any other element of compensation to be received in the future, are not protected by the Compensation Clause.[7]

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[6] (Brief for the United States, pp. 16-17, 48-49).

[7] By arguing that retirement benefits are deferred compensation, the government proves too much. Under precisely the same rationale, the right to regular cost-of-living

Moreover, the government's alternative argument is no more valid than the rationale used by the majority below. In *Will*, the Court held that Article III protection attached to salary adjustments when those adjustments *became law*, which, under the law at issue in *Will*, was midnight on October 1 of each year. (*See* Pet., pp. 26-27 & n.20). There was no "services rendered" requirement stated or implied in the Court's rationale. Under the government's "services rendered" theory, the Court in *Will* would not have had to analyze the statute there and determine when the adjustment became law to decide when "vesting" occurred. (*See id.*, pp. 27-28). The *Will* Court could have decided the issues simply on the basis of whether services had been rendered or not. And, had it done so, the *Will* Court would have ruled for the government, rather than the plaintiff judges, on the claims asserted for Year One.[8] Petitioners respectfully submit that the relevant inquiry is when the law setting compensation takes effect, not when a judge first renders service under the adjusted pay rate. (*See id.*, pp. 26-27).

2. To bolster its arguments that only pre-existing pay levels are protected, the government attempts to add the adjective "pre-existing" to the Compensation Clause. (Bf. Opp., p. 17). The government also attempts to change the tense and thus the meaning of the Clause. (*Id.*, p. 16). Whereas the Constitution directs that judges "shall, at stated Times, receive" (present or future tense) a "Compensation," the government claims that the Clause only protects that which has been "previously 'receive[d].' " (*Id.*). Moreover, the right to receive compensation "at

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adjustments is certainly a part of a judge's compensation package for current services. (*See Hatter*, 121 S. Ct. at 1798-00 (Scalia, J., concurring in part, dissenting in part)).

[8] In Year One, the effort to bar the adjustment came shortly after midnight on October 1. Obviously, some judges had not yet begun rendering services in the early hours of October 1.

stated Times" should leave no question that Congress has the power to establish irrevocable judicial pay adjustments, payable at future "stated Times." (*See also* Pet., pp. 15-18).

3. The government complains that, if petitioners prevail, district judges will be paid more than members of Congress and as much as Cabinet secretaries; and circuit judges will earn even more. (Bf. Opp., p. 21). But neither the Constitution nor any statute prohibits judges from receiving higher salaries than these officers. Indeed, for many years judges received higher pay because the Compensation Clause prevented any reduction in their salaries, whereas the salaries of other officers were not protected. *See Booth v. United States*, 291 U.S. 339 (1934); *O'Donoghue v. United States*, 289 U.S. 516 (1933).

The government argues that, in enacting the Ethics Reform Act, Congress intended that "salary parity" be maintained among judges, members of Congress and Executive Branch officials covered by the Act. (Bf. Opp., p. 21). But parity is referenced only in Section 701 of the Act, which governs increases in pay received pursuant to the Quadrennial Citizen Commission's Recommendations. Pub. L. No. 101-194, § 701(i), 103 Stat. 1766 (1989). Significantly, Section 703, which provided for the 25% increase payable January 1, 1991, has no parity requirement. In fact, Senators were not included in that increase. (App. 172, Ethics Reform Act § 703(a)(2)(B)). Therefore, Section 703 not only did *not* require parity, it *mandated disparity*. Similarly, the COLA provision at issue here, Section 704, says nothing about parity. If Congress intended that judges' COLAs would be paid only when members of Congress received adjustments, it would have so provided.

4. The government turns the District of Columbia Circuit's decision in *Boehner v. Anderson*, 30 F.3d 156 (D.C. Cir. 1994), upside down in an effort to avoid its clear application here. (Bf. Opp., pp. 20-21). The *Boehner* court held that the Ethics Reform Act's COLA provisions fixed

by law future salaries of members of Congress and judges. (*See* Pet., pp. 22-23). If those salaries were established by law for purposes of Article I, they were also established by law for purposes of Article III.

5. Petitioners agree that Congress can prevent judicial COLAs from going into effect by withholding comparability adjustments for General Schedule employees. (Bf. Opp., p. 19). The payment of COLAs to General Schedule employees is the one condition to the payment of COLAs to judges. Once that condition has been satisfied, however, as it was in each of the years at issue here (Pet., pp. 23-24), judicial salaries are irrevocably altered under any test for vesting. (*See id.*, p. 28 n.21).

6. The government's statement that "there has been no reduction in judges' stated legal salary" (Bf. Opp., p. 20) is wrong. (*See* Pet., p. 24). The panel majority below recognized that judges' stated legal salaries had been reduced in each of the years in question. All conditions for payment had been satisfied and "everything necessary" for payment had occurred "except for the passage of time." (App. 23). The majority below held that stated legal salaries can be reduced at any time before they are received.[9]

7. The government says that here, unlike in *Hatter v. United States*, 121 S. Ct. 1782 (2001), there is no unconstitutional discrimination. It argues that in *Hatter* judges were treated differently from other high-level officials, whereas here members of Congress and certain members of the Executive Branch were also denied COLAs. But the fact that Congress also withheld the COLAs from a small

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[9] Thus, if one Congress enacts a salary schedule that provides for increases to be received in future years (*e.g.*, a 15% increase to be received in 5% increments over three years), the second and third payments could be rescinded by the next Congress, even if the prior Congress had specifically provided that the rights to the increases were intended to "vest" immediately.

group of other federal employees does not avoid the discriminatory effect of the blocking statutes. *See id.* at 1793 (considering the "history, context, statutory purpose, and statutory language" to determine that "federal employees [was] the appropriate class" against which to measure the alleged discrimination). In addition, under the government's Section 140 theory, judges are the *only* federal employees not entitled to annual COLAs. (*See supra*, at 2 n.1).

The 101st Congress determined that there was a need to include, as a component of judges' compensation, annual COLAs that would not be subject to the kind of political maneuverings that had frustrated the payment of COLAs under the prior law. (*See* Pet., pp. 20-21). Once that Congress enacted the law to provide these adjustments, to deny their payment to judges when all other career federal employees receive them is discrimination prohibited by *Hatter*.

CONCLUSION

If anything, the government's opposition provides additional bases for granting certiorari. Petitioners respectfully submit that, for all of the reasons stated in the petition and in this reply, the petition for certiorari should be granted and limited to the constitutional questions addressed in the position.

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November, 2001

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

SPENCER WILLIAMS, et al., Plaintiffs-Appellees,	)	
v.	)	Nos. 00-1254, 00-1255
UNITED STATES Defendant-Appellant.	)	

MOTION BY THE APPELLANT UNITED STATES TO CORRECT A MISSTATEMENT IN ITS BRIEFS

The defendant-appellant United States hereby moves to correct a misstatement in its opening and reply briefs in the above-captioned case.

As the Court is aware, this case involves a claim by the plaintiff Article III judges that they are constitutionally entitled to certain cost-of-living increases that were stopped by Congress before they went into effect. The defendant/appellant United States has argued that the plaintiffs are not entitled to these salary increases, in part because of Section 140 in Public Law No. 97-92 (95 Stat. 1200 (1981)). That section provides that funds appropriated in the future shall not be expended to increase the salary of any federal judge except as specifically authorized by Act of Congress.

In our opening appellate brief, at page 10, we described the enactment of the Ethics Reform Act of 1989, and how that statute, among other things, raised the basic pay for federal judges by 25%. We stated that in Section 702(c) of the Ethics Reform Act (103 Stat. 1768), Congress had provided the specific authorization required by Section 140 for this 25% increase. Having discussed this

matter with opposing counsel, we now recognize that our statement is in error. Instead, Section 702(c) provided the Section 140 authorization for a different increase provided to federal judges by the Ethics Reform Act (restoration of a prior increase in basic pay). (The relevant statutory provisions are reprinted in the Appendix in this case at pages 130-31.)

In addition, we made this same mistake in our reply brief at page 9. And, we recall that this issue arose at oral argument. Although we correctly pointed out at argument that Section 140 was specifically mentioned in Section 702(c) of the Ethics Reform Act, it was to authorize a different basic pay increase for judges, rather than the 25% increase.

We apologize to the Court and to opposing counsel for this error.

For the foregoing reasons, the appellant United States moves to correct a misstatement in it appellate briefs in this matter.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

SPENCER WILLIAMS, et al.,	)	
	)	
Plaintiffs-Appellees,	)	No. 99-1572
vs.	)	
UNITED STATES,	)	
	)	
Defendant-Appellant.	)	

RESPONSE TO THE MOTION OF APPELLANT TO CORRECT A MISSTATEMENT IN ITS BRIEFS

Plaintiffs-Appellees have no objection to the motion of the Defendant-Appellant, United States ("defendant"), to correct a misstatement made in its briefs and at oral argument. Defendant's motion, however, does not explain the significance of the error it now acknowledges.

1. In this appeal, the defendant argues that before judges may receive any salary increase, including annual cost-of-living adjustments, Congress must pass a statute pursuant to Section 140 of Public Law No. 97-92, 95 Stat. 1182 (1981) ("Section 140"), specifically authorizing payment or waiving the application of Section 140. In opposition, plaintiffs argue that even if Section 140 was viable in 1989, when the Ethics Reform Act, Pub. L. No. 101-194, 103 Stat. 1716 (1989), was adopted, that Act provided any specific authorization which defendant claims is required by Section 140. (*See* Appellees' Brief, pp. 51-54).

The Ethics Reform Act provided three separate salary increases for judges:

- Section 702 of the Act restored cost-of-living adjustments payable under the prior law for 1989

and 1990. Section 702 contained a specific waiver of Section 140. *See* Ethics Reform Act § 702(c).

- Section 703 of the Act provided for a 25% increase in salaries effective January 1, 1991. There was no waiver or other reference to Section 140 in Section 703 and no subsequent Section 140 resolution was passed. The 25% increase was paid on January 1, 1991. The Ethics Reform Act thus provided the only authority required for payment of this salary increase.

- Section 704 of the Act provided for payment of annual cost-of-living adjustments. Section 704 also took effect on January 1, 1991. As in Section 703, there is no mention of Section 140.

The failure to mention Section 140 in Section 704, like the failure to mention Section 140 in Section 703, is conclusive evidence that no further authorization was required for payments provided for in that Section of the Act. Plaintiffs respectfully submit that it is impossible to distinguish between the payment of the 25% increase effective January 1, 1991, provided for in Section 703 and the payment of cost-of-living adjustments effective January 1, 1991, provided for under Section 704. Thus, assuming Section 140 had any continued viability at the time the Ethics Reform Act was enacted, that Act either superceded Section 140 or constituted a statute "hereinafter enacted" in compliance with Section 140. (*See* Appellees' Brief, pp. 51-54).

2. Another statement in defendant's motion requires clarification. In its introductory paragraph (page 1), the defendant inaccurately describes plaintiffs' claims as seeking "certain cost-of-living increases that were

stopped by Congress *before they went into effect.*" (Emphasis added). This statement is inaccurate.

Plaintiffs claim they are entitled to cost-of-living adjustments once the *statute* authorizing those payments took effect, or, at the latest, once all conditions to payment have been satisfied. (*See* Appellees' Brief, pp. 39-43).

All the payments at issue here were authorized by a single law, Section 704, not a series of laws enacted each year as was the circumstance before the Court in *United States v. Will*, 449 U.S. 200 (1980). See *Boehner v. Anderson*, 36 F.3d 156, 161 (D.C. Cir. 1994), where the Court emphasized the important distinction between the effective date of the statute authorizing all future COLA's (*i.e.*, January 1, 1991), and the date upon which the payment of each COLA first occurs (*i.e.*, the first day of the first pay period following January 1). Under the new Act, the annual adjustments do not involve lawmaking; these annual adjustments are merely "calculations performed by non-legislative administrative staff, following a specific formula provided by Congress in the Act." *Schaeffer v. Clinton*, 54 F. Supp. 2d 1014, 1024 (D. Colo. 1999). Judges' rights to "compensation" are fixed by law, not by ministerial acts by administrative personnel. Article III protection vests when the *statute* establishing the pay takes effect. *United States v. Will*, 449 U.S. at 230.

Respectfully submitted

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No. 01-175

IN THE

Supreme Court of the United States

SPENCER WILLIAMS, *et al.*,

Petitioners,

v.

UNITED STATES,

Respondent.

ON PETITION FOR WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* SUPPORTING PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

The ABA, with more than 400,000 members, is the leading national membership organization of the legal profession.[1] In serving "the public and the profession by promoting justice, professional excellence and respect for the law," the ABA is guided by the following important goals, among others: (1) "to promote improvements in the American system of justice"; (2) "to advance the rule of law"; and (3) "to preserve the independence of the. . .judiciary as fundamental to a free society." *ABA Policy & Procedures Handbook,* at 2 (ABA 2000).[2]

As the principal voice of the American legal profession, the ABA has the expertise — and obligation — to address the issues presented by this case, and has already done so independently of the litigants. Twelve ABA policy statements since 1963 have consistently supported increased judicial pay. With the Federal Bar Association ("FBA"), the ABA has studied the phenomenon of "pay erosion" within the federal judiciary, which is at the core of this case. The results of the ABA/FBA study, released in February, 2001, and discussed herein, demonstrate the seriousness of this problem, and thus the importance of this case, apart from the immediate interests of any of the litigants.

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1. The ABA certifies that this brief is filed with written consent of all parties, said consents having been lodged with the Court. Supreme Court Rule 37.2(a). The ABA also certifies that no counsel for any party authored this brief in whole or in part and that no person or entity, other than the *amicus curiae,* its members, and its counsel, has made any monetary contribution to the preparation or submission of this brief. Supreme Court Rule 37.6

2. Neither this brief, nor the decision to file it, should be interpreted to reflect the views of any judicial member of the ABA. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions herein. This brief was not circulated to any member of the Judicial Division Council prior to filing.

Thus, the ABA's participation as *amicus curiae* will assist the Court in understanding the profound impact of continuing erosion of the compensation of federal judges — particularly since the judiciary has been adversely affected by denial of cost-of-living adjustments ("COLAs") that are guaranteed by statute to almost all other government employees.

STATEMENT

Petitioners (plaintiffs below) are sitting or former federal judges, both active and senior status, who filed suit after Congress blocked COLAs to their salaries for four of five years, 1995-7 and 1999. Under the applicable statutory scheme, "once a determination was made by Congress in a given year that a COLA would be paid to federal employees on the General Schedule, a COLA became payable to federal judges." (Pet. App. 3a) (citation omitted). Congress, however, "passed separate laws. . .that expressly barred the payment of the COLAs to federal judges." (Pet. App. 4a) (citations omitted).

The district court ruled for petitioners. It held that special legislation denying statutorily mandated COLAs to federal judges violated Article III, section 1 of the United States Constitution, which bars Congress from diminishing the compensation of the federal judiciary. (Pet. App. 103-31a).

A divided court of appeals reversed. (Pet. App. 1-99a). The majority held that, under the "vesting" rule of *United States v. Will*, 449 U.S. 200 (1980), as long as Congress acts before an otherwise automatic pay increase goes into effect, it can block any number of consecutive, statutorily-mandated judicial COLAs. (Pet. App. 23-26a). The dissent concluded that under *Will*, Congress created a vested Article III obligation by mandating automatic cost-of-living adjustments for all federal employees, and that Article III precluded the *ex post facto* alteration of that mandate to the detriment of the judiciary. (Pet. App. 70-72a). The majority and the dissent thus

follow dramatically different interpretations of the *Will* decision. Only this Court can decide which of these interpretations is correct.[3]

Diminution of judicial pay has rightly been called the most pressing issue now facing the federal judiciary. The drafters of Article III were well aware of inflation, knew that inflation could render penurious what was once satisfactory compensation, and permitted upward adjustments in judicial pay. In 1989, Congress did just that, but its upward adjustments were retroactively blocked by later Congresses.

For over thirty years, Congress has grappled with the issue of judicial compensation, trying several different approaches — but these all linked Article III-protected judicial pay with pay for members of Congress (and other senior officials), who lack such constitutional protection. This linkage has been a persistent and fatal flaw, permitting the political pressures affecting congressional pay to wreak havoc with the pay of federal judges. The result has been continuous and substantial reduction in the purchasing power of judicial salaries.

Judicial compensation is at a level of inadequacy that threatens to impair the quality and independence of the federal judiciary. As the real value of judicial pay has eroded, the incomes of top-notch private-sector attorneys have risen dramatically. This disparity impairs the ability of the judiciary to retain experienced judges and to attract the kind of highly qualified candidates essential to maintain the historically high standards of the federal bench. Thus, for both legal and jurisprudential reasons, this Court should grant *certiorari*.

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3. After the Court of Appeals decision at issue here was rendered, this Court addressed the constitutionality under the Compensation Clause of certain Medicare and Social Security taxes. *United States v. Hatter*, 121 S. Ct. 1782 (2001). *Hatter* held that, although the Compensation Clause prohibits taxation that singles out judges for specially unfavorable treatment, it does not forbid Congress from enacting a law imposing a nondiscriminatory tax upon judges and other citizens. *Id.* at 1791-92. Applying that standard, this Court found the Social Security taxes, but not the Medicare taxes, unconstitutional. *Id.* at 1793.

REASONS FOR GRANTING THE PETITION

I. SEVERAL PAY-SETTING STATUTES HAVE FAILED TO INSULATE FEDERAL JUDICIAL SALARIES FROM THE POLITICS OF CONGRESSIONAL PAY.

Continuing erosion of judicial pay is "the most pressing issue facing the Judiciary." *2000 Year-End Report on the Federal Judiciary,* at 1 (U.S. Jan. 1, 2001) (*"2000 Year-End Report"*). As detailed in the recent American Bar Association/Federal Bar Association report, *Federal Judicial Pay Erosion: A Report on the Need for Reform* (ABA/FBA Feb. 2001) (*"Judicial Pay Erosion"*) (available online at <http://www.abanet.org/poladv/fedjudreport.pdf> (visited Sep. 6, 2001), this process has been going on for over thirty years. Combined with increased private sector lawyer compensation, the *de facto* reduction in judicial compensation threatens to impair the ability of the federal judiciary to attract and retain judges of the highest caliber.

The authors of Article III prohibited diminution of judicial pay, but not future increases, knowing full well the ravages of inflation — that "fluctuations in the value of money" precluded fixed judicial compensation because, over a life tenure of several decades, "a stipend, which would be very sufficient at their first appointment, [could] become too small in the progress of their service." Alexander Hamilton, James Madison & John Jay, *The Federalist,* No. 79, at 400-01 (Bantam Books 1982). *See generally United States v. Hatter,* 121 S. Ct. 1782, 1790-91 (2001); *Judicial Pay Erosion,* at 4.

Thus, this Court recently held that the Constitution forbids diminution of judicial salaries — including "indirect" diminution:

> [T]he Compensation Clause offers protections that extend beyond a legislative effort directly to diminish a judge's pay. . . . Otherwise a legislature could circumvent even the most basic Compensation Clause protection by. . .precisely but indirectly achiev[ing] the forbidden effect.

Hatter, 121 S. Ct. at 1791 (citation omitted).

There are currently approximately 1,300 active and senior judges in the Article III judiciary.[4] They depend upon Congress to avoid having their compensation reduced by inflation. But for thirty years federal pay-setting procedures have failed to operate, to the point of jeopardizing the continued independence of the judicial branch.

The crux of the problem is congressionally-imposed linkage of judicial salaries protected by Article III with other salaries — particularly those of members of Congress — that do not enjoy such constitutional protection. Thus, federal judges have borne the consequences of the political reluctance of Congress to increase its own pay, or even to accept previously mandated COLAs.

The last thirty years have seen Congress create and discard several procedures for adjusting judicial compensation. Throughout, however, Congress has injected the politically contentious issue of its own compensation into this mix.

A. *The Postal Revenue and Federal Salary Act of 1967*

Top-level salaries in all three branches of government were first linked in 1969. Salary parity was proposed by the initial Commission on Executive, Legislative and Judicial Salaries ("Quadrennial Commission"), created by the Federal Salary Act of 1967.[5] The Quadrennial Commission, comprised of private sector members appointed by the President, the leaders of the Senate and House of Representatives, and the Chief Justice, was to meet every four years and examine salaries of the judiciary, members of Congress, and senior executive branch personnel both *inter se* and in relation to the General Schedule that sets the salaries for most federal employees. Its recommendations were reviewed by the President, who then submitted them to Congress. Congress was required to vote

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4. Of the 858 Article III judicial positions, 840 are in the District Courts and Courts of Appeals. <http://www.uscourts.gov/vacancies/summary.html> (visited Aug. 17, 2001). There are also 458 senior Article III judges. *Statistical Rep. for Justices & Judges of the United States* (Jun. 1, 2001).

5. Pub. L. No. 90-206 § 225, 81 Stat. 613, 642 (1967) (codified as amended at 2 U.S.C. §§ 351-61 (2000)).

on the President's salary proposal within 60 days. *See Will,* 449 U.S. at 203 (describing Salary Act); *Judicial Pay Erosion,* at 4-5.

The Quadrennial Commission system was an attempt to insulate Congress from the politically explosive issue of increasing its own pay. Necessary salary adjustments would be recommended by the Quadrennial Commission and adjusted to political realities by the President. By placing the initial recommendation in the hands of an independent commission, and by involving the President, Congress hoped to minimize the political consequences of accepting pay raises for itself.

In the beginning, the process worked as intended. In 1969, Congress adopted the Quadrennial Commission's proposal to adjust all three branches' salaries for several years of inflation. Judicial pay increased by $10,000 a year for district judges and by $9,500 a year for circuit judges. *Judicial Pay Erosion,* at 5. For eight years thereafter, neither the judiciary nor other covered officials received any salary adjustment. *2000 Year-End Report,* at 4.

B. The Executive Salary Cost-Of-Living Adjustment Act of 1975

Prolonged stasis on compensation issues led Congress to try again with the Executive Salary Cost-Of-Living Adjustment Act of 1975.[6] The intent of this statute was to provide the judiciary, members of Congress, and senior executive branch personnel with the same COLAs that rank-and-file federal employees received. *2000 Year-End Report,* at 5. These COLAs were subject to congressional veto, 2 U.S.C. § 359(2)(A) & (4)(A) (2000), and were to be in addition to salary increases granted through the Quadrennial Commission review process.

The Adjustment Act failed because Congress statutorily linked its own members' COLAs with those received by Article III judges and other covered persons. 2 U.S.C. § 362(3)(A) (2000). For political reasons, Congress frequently vetoed or reduced the annual cost-of-living adjustments

6. Pub. L. No. 94-82, 89 Stat. 419 (1975) (codified at 5 U.S.C. §§ 5305-06 (2000)).

provided under the Adjustment Act — decisions that applied equally to judges and other persons covered by the Act.

Under the Adjustment Act, Congress allowed one five percent COLA in 1975, but then blocked four consecutive COLAs in 1976-79, which together would have increased judicial (and congressional) salaries by some 28 percent. *Will,* 449 U.S. at 205-08. Several judges brought suit seeking restoration of the four COLAs. In *Will,* the Court struck down revocation of two of the COLAs as unconstitutional diminutions of salary under Article III because the raises had already "vested" before Congress had acted, while upholding the other two denials because they took effect before the beginning of the fiscal year to which the COLAs pertained. *Will,* 449 U.S. at 224-29.[7]

After *Will,* between 1982 and 1985, the federal judiciary (and other covered persons) received annual COLAs of between 3½ percent and 4 percent. U.S. Comm'n on Exec., Legis. & Jud. Salaries, *Report (1986), reprinted in, Promises Made, Promises Still Unkept: Restoration of Inflation-Induced Salary Cuts for Top Gov't Officials 1986-87,* at 112-14 (1986) (*"Promises Still Unkept"*). Congress reduced the Quadrennial Commission's salary recommendations in 1986 and rejected all of the recommendations of the 1988 Commission. *Judicial Pay Erosion,* at 6.[8] Thus, Congress acted on only three of seven Quadrennial Commission reports. *Bipartisan Task Force on Ethics, 101st Cong., Rep. on H.R. 3660, Government Ethics Reform Act of 1989* (1989), *reprinted in,* 135 Cong. Rec. H9253, H9264 (daily ed. Nov. 21, 1989) (*"Report on H.R. 3660"*); *2000 Year-End Report,* at 4.[9]

7. *Will* restored judicial COLAs for 1976 and 1979. 449 U.S. at 225-26, 229-30.

8. The Quadrennial Commission would not have met in 1986, except that the 1984 Commission was devoted to the implications of *INS v. Chadha,* 462 U.S. 919 (1983), which invalidated a legislative veto indistinguishable from that in the Salary Act. *See Judicial Pay Erosion,* at 6 n.21.

9. In 1981, Congress passed a continuing resolution, Pub. L. No. 97-92, that included a provision requiring specific congressional action before judges received any COLA. The court below held that this section expired in accordance with its terms in 1982, and is of no current relevance. (Pet. App. 8-11a).

C. The Ethics Reform Act of 1989

The 1975 legislation "only reopened to political gamesmanship what was intended to be a more objective and automatic cost-of-living adjustment." *Report on H.R. 3660,* 135 Cong. Rec. H9264. Concern over recruitment and retention of senior judicial and executive branch personnel prompted Congress to change the compensation-setting process once again in 1989. Congress passed the Ethics Reform Act,[10] which adopted many of the 1988 Quadrennial Commission recommendations and replaced the Commission with a "Citizens Commission."[11] It also revised the mechanism for determining COLAs for the judiciary, members of Congress and senior executive branch personnel.

The Ethics Reform Act sets COLAs for covered officials, which include judges and members of Congress, using the Employment Cost Index ("ECI")[12] – up to an annual maximum of five percent. 5 U.S.C. §§ 5302(2), 5318, note (2000). Congress intended the ECI mechanism to provide regular COLAs for covered officials and thereby prevent the need for periodic major "catch-up" adjustments of the sort enacted in 1989. *Judicial Pay Erosion,* at 7.

Beyond mandating COLAs, the Ethics Reform Act also limited the amount of outside income that federal judges and members of Congress could earn from writing, barred acceptance of honoraria, and imposed mandatory workload requirements on senior judges. 5 U.S.C. App. 4 §§ 501(a-b), 502; 28 U.S.C. § 375 (2000).

The scheme of the Ethics Reform Act has been no more successful than its predecessors at halting erosion of judicial

10. Pub. L. No. 101-194, 103 Stat. 1716 (1989). This Act is codified in various titles, most notably at 5 U.S.C. § 5318 (2000).

11. The new commission was to have five members selected from the public at large and six members appointed by the heads of the three branches of government, 2 U.S.C. § 352 (2000), but it has never met. *2000 Year-End Report,* at 6. As a result, there has been no overall review of federal judicial salaries since the 1988 report of the now-abolished Quadrennial Commission. *Judicial Pay Erosion,* at 7.

12. The ECI is a quarterly Bureau of Labor Statistics index measuring changes in wages and salaries paid to private sector employees. 5 U.S.C. § 5302(2) (2000).

salaries. Although the limits upon outside judicial income remain, Congress allowed the ostensibly automatic annual COLAs for the judiciary (and itself) only in 1991-93, 1998, and 2000-01 (Pet. App. 8a); *Judicial Pay Erosion,* at 7. Thus on March 14, 2001, the Judicial Conference of the United States voted to seek yet another "catch up" adjustment for federal judges, this time of 9.6 percent.[13] Congress has permitted only three cost-of-living adjustments since 1993 – in 1998 (2.3 percent), 2000 (3.4 percent), and 2001 (2.7 percent). *2000 Year-End Report,* at 5-6.

II. DIMINUTION OF JUDICIAL COMPENSATION OVER THE PAST THIRTY YEARS HAS BEEN SIGNIFICANT.

Thirty years of failed efforts to regularize review of judicial compensation have produced an absolute decline in the present value of judicial salaries and an even steeper relative decline in compensation compared to the peer group of successful attorneys from which the federal judiciary is drawn. In 1988, the Quadrennial Commission cautioned that these trends "diminish the quality of justice in this country by dissuading the best and the brightest. . .from service on the Federal bench." U.S. Comm'n on Exec., Legis. & Jud. Salaries, *Fairness for Our Public Servants,* at 27 (1988).

The sporadic salary increases the judiciary has received have not kept pace with inflation. From 1969 to 2000, the purchasing power of a federal district judge's pay has declined by almost a quarter (24.6 percent) – when measured against the Consumer Price Index ("CPI").[14] Erosion of judicial salaries is even more significant when measured against "big ticket" expenses that federal judges typically face, such as housing (up 30.5 percent during the same period) and their children's college tuition (up 111.3 percent).[15]

13. *See* Admin. Off. of U.S. Courts, *News Release* (Mar. 14, 2001) (available at <http://www.uscourts.gov/Press_Releases/jc301.pdf.> (visited Aug. 17, 2001)).

14. *Judicial Pay Erosion,* at 9, Chart A. This chart (1a), and others from the same report, are found in the Appendix attached to this brief.

15. College tuition has been a frequently cited reason for federal judges

Moreover, the 24.6 percent diminution in judicial salaries as of 2000 understates the degree to which the federal judiciary's compensation has declined over the past thirty years. Between 1974 and 1989, when inflation was worse, the diminution was even greater — between 25.6 percent (1974) and 33.8 percent (1989) in real terms. *Judicial Pay Erosion,* at 10 & Chart C (2a). Salary trends further demonstrate diminution of federal judicial salaries. Between 1969 and 1999, the pay of district judges increased 253.1 percent — well below the overall CPI increase of 363 percent. The judiciary's decline in purchasing power compares with an average 420.6 percent increase in private sector wages during the same period of time. *Id.,* at 11, Chart D (3a).

Diminution of judicial compensation is even more dramatic when compared to income in the legal profession — the constituency from which federal judges are drawn. *2000 Year-End Report,* at 6-7. The value of rendering public service in a highly visible and respected role has its own intrinsic rewards, but those rewards are not inexhaustible. Marked disparity between judicial pay and private salaries for lawyers reduces the pool of highly qualified judicial candidates and makes it more difficult to retain experienced jurists.

The disparity between salaries of federal judges and those of their peers in private practice has reached a dangerous level. Experienced private-sector attorneys are perhaps the best reference point in terms of comparable knowledge and "value" to their employers. Such salaries provide a stark contrast. In 2000, partners at the largest national law firms were paid on average well in excess of $500,000. *Id.* at 7.[16] The average partner draw at the next tier of large firms (*American*

NOTES *(Continued)*

returning to more lucrative private practice. Bill McAllister, *"The Judiciary's 'Quiet Crisis': Prestige Doesn't Pay the Tuition,"* Wash. Post, at A19 (Jan. 21, 1987).

16. In 2000, average annual partner compensation at the 100 largest American law firms ranked by *The American Lawyer* in terms of gross revenue ranged from $3,195,000 to $225,000. Averaging these 100 firm averages yields a nationwide average annual partner compensation of $722,050 for these firms. *See "The AmLaw 100,"* 23 Am. Lawyer, at Pull-Out Table (Jul. 2001).

Lawyer "Second 100") in 1999 was approximately $363,000.[17] The current salaries of federal district ($145,100) and appellate ($153,900) judges are thus a fraction — often a small fraction — of what these judges could earn in private practice. *2000 Year-End Report,* at 6.

Indeed, starting annual associate salaries at major law firms routinely exceed $100,000. *"What Lawyers Earn: NLJ's Annual Report,"* 23 Nat'l L.J. A25-27 (Oct. 2, 2000). Major metropolitan law firms, including those in Washington, DC, often pay first-year lawyers $125,000 a year. *Id.* Several major firms in 2000 offered new recruits salary and bonus packages that paid them more than the federal district or circuit court judges for whom many of them clerked, *2000 Year-End Report,* at 6-7 — and these judges were all highly experienced lawyers before joining the bench.[18] The financial sacrifice that judges make to serve on the federal bench is growing ever greater, as is the corresponding lure of alternative private employment for federal judges who find themselves financially strapped.

Thus, the Founding Fathers' fears are proving prescient. Alexander Hamilton's worry, when Article III was being considered, that inflation could make judicial pay "penurious and inadequate" has been coming to pass over the last thirty years. *The Federalist,* No. 79, at 400. This erosion of judicial compensation "breaches faith with the Constitution." U.S. Comm'n on Exec., Legis. & Jud. Salaries, *Report, reprinted in, Promises Still Unkept,* at 189.

III. WHILE JUDICIAL COMPENSATION HAS DIMINISHED, JUDICIAL WORKLOADS HAVE INCREASED.

As judicial salaries have eroded, the quantity and complexity of federal caseloads has burgeoned. The per-capita caseload of federal district judges has increased dramatically

17. *See "The AmLaw 200,"* 22 Am. Lawyer, at Table (Aug. 2000). The calculation is the same as described in the previous footnote.

18. Federal judges also lag significantly behind peers in academe. *See "What Lawyers Earn,"* 23 Nat'l L.J. at A31 (surveying law school dean salaries).

since 1969. In 1969, there were 110,778 new filings in the federal court system. *Judicial Pay Erosion,* at 13. In 2000 there were almost three times as many filings — 322,262. *2000 Year-End Report,* at 10-11 & n.7. Creation of additional federal judgeships has not kept pace. Average per capita district court caseloads increased by 55.2 percent over the same period, from 339 to 526 per judge. *Judicial Pay Erosion,* at 14, Chart E (4a).

The courts of appeals have experienced an even greater workload increase. Appellate filings escalated five-fold, from 10,709 in 1969 to 54,697 in 2000. *Id.* at 14; *2000 Year-End Report,* at 10. The per-judge caseload of the circuit courts has grown 195 percent — from 123 cases in 1969 to 363 in 1999. *Judicial Pay Erosion,* at 14, Chart F (5a).[19]

Not only are there more active cases, but the nature of those cases has become progressively more complex since 1969 — particularly with new federal statutory causes of action such as RICO, CERCLA, and ERISA, liberalization of class action requirements under Fed. R. Civ. P. 23, and tightened judicial scrutiny of expert witnesses. The greater complexity of the federal caseload is reflected in the publications of the Federal Judicial Center. *E.g., Reference Manual on Scientific Evidence 2d* (Fed. Jud. Ctr. 2000); *Manual for Complex Litigation 3d* (Fed. Jud. Ctr. 1995).

Federal courts have been increasingly called upon to resolve many of the major legal, political, and social disputes of our time. Rapid developments in intellectual property, medical science, internet commerce, and the globalization of both the economy and criminal ventures are spawning novel and complicated disputes "many of which straddle the intersections of law, technology, and the physical, biological and social sciences." *2000 Year-End Report,* at 15. These cases require greater intellectual prowess and procedural creativity from the judiciary. But as the jobs of federal judges require more and more, they are being paid less and less.

19. The caseload explosion would be worse but for efforts of senior judges, who carry substantial caseloads even after retiring from active status. In 1999, almost 15 percent of federal appeals and almost 20 percent of federal trials were before senior judges. *Judicial Pay Erosion,* at 15.

IV. JUDICIAL PAY EROSION UNDERMINES THE GUARANTEES OF LIFETIME TENURE AND UNDIMINISHED SALARY THAT WERE DESIGNED TO SAFEGUARD JUDICIAL INDEPENDENCE.

The drafters of Article III knew that substantial compensation was necessary to attract and keep persons "of the first talents" as federal judges. 2 *Records of the Federal Convention of 1787,* at 429 (Farrand rev. ed. 1937) (remarks of General Pinkney). They knew the difficulty of inducing those with "sufficient skill in the laws to qualify them for the stations of judges" to "quit[] a lucrative line of practice to accept a seat on the bench." *The Federalist,* No. 78, at 399. Commitment to lifetime public service is necessarily diminished by financial pressures that deter many candidates from seeking appointment to the federal bench and that cause sitting judges to resign from the bench to enter private practice.

Not surprisingly, members of the federal judiciary are increasingly deciding to leave the bench. The Eastern District of Pennsylvania, for example, has lost three members to private practice in recent years, including a plaintiff in this litigation.[20] During the 1990s, fifty-four Article III judges resigned or retired from the federal bench. *2000 Year-End Report,* at 6. There were forty-one retirements in the 1980s, twenty-four in the 1970s, and only three during the 1960s. *Id.; Promises Still Unkept,* at 48. In the 1970s and 1980s, there were more judicial resignations "than at any time in the history of the nation," and 75 percent of the resigning judges offered "inadequate compensation" or "better offers" in the private sector as the reason. *Promises Still Unkept,* at 48-49 (footnotes omitted). The crisis only accelerated over the past decade. The 1990s saw more than forty percent of all retirements from the federal bench since 1965. *Judicial Pay Erosion,* at 15.

Early departure from the bench imposes substantial tangible and intangible costs upon the judiciary. When an experi-

20. *"Bechtle to Step Down From Bench,"* 224 Leg. Intelligencer 1, 8 (Am. Lawyer Jun. 4, 2001).

enced federal judge retires or resigns, his or her caseload must be assumed by other judges of the same court until such time as the resulting vacancy is filled — a process that at minimum takes months and, increasingly, can take years. *See* <http://www.uscourts.gov/vacancies/judgevacancy.htm> (visited Aug. 17, 2000) (duration of current vacancies). Moreover, when an experienced judge leaves, the judiciary loses the valuable skills and insights of the departing jurist, something not quickly or easily replaced.[21] New appointees rarely ascend the bench with the range of capabilities and background that years of judicial experience provide. "It takes five years for a qualified attorney to reach peak efficiency as a Federal judge." "*Federal Judicial Salaries: A Gamble with the Future,*" at 1 (Corp. Comm. for Fair Comp. of the Fed. Judiciary 1985) (quoting former Chief Justice Warren Burger).

Diminution of judicial compensation further affects anyone considering whether to accept judicial appointment. This impact upon recruitment is perhaps the most disturbing of all, since it narrows *ab initio* the talent pool from which the federal judiciary is drawn. Inadequate judicial salaries disadvantage the judiciary in the "war for talent." Those responsible for recruiting and reviewing judicial candidates report this problem as the single most important factor discouraging potential candidates from seeking judicial appointment.[22]

Most candidates for the bench earn, or have the potential to earn, much more than the salary of a federal judge. Qualified candidates who lack independent wealth are perfectly capable of meeting current and anticipated financial obligations by reason of their earning capacity, but not if that earning capacity is artificially and substantially limited by inadequate judicial pay. The federal judiciary is enriched by diverse backgrounds of all sorts — including financial status.

---

21. Judge Bechtle, for example, was a member of the Judicial Panel on Multi-District Litigation, and specialized in administration of mass tort litigation. *Bechtle to Step Down*, 224 Leg. Intelligencer at 8.

22. *Managing Human Capital in the Twenty-First Century: Hearing Before the Subcom. on Gov't Management, Restructuring, & the Dist. of Columbia, Senate Comm. on Governmental Affairs*, 106th Cong., 2d sess., at 18 (Mar. 9, 2000) (remarks of Sen. Durbin); *Judicial Pay Erosion*, at 17.

The diminution in judicial compensation reduces socio-economic pluralism by increasingly closing the federal bench to those without significant sources of unearned income. "We cannot afford a Judiciary made up primarily of the wealthy." *2000 Year-End Report*, at 3.

The Constitution of the United States ensures the independence of the judiciary by granting federal judges lifetime tenure upon good behavior and by prohibiting diminution of judicial compensation. *U.S. Const.*, Art. III, § 1; *see The Federalist*, No. 79, at 400 ("[n]ext to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support"); *2000 Year-End Report*, at 2 (these provisions are "key to the independence of the federal Judiciary"). As discussed above, this litigation presents important questions relating to the continued viability of these guarantees.

This Court should decide whether Article III's guarantee of undiminished judicial compensation can be undermined by special legislation denying COLAs to federal judges. Erosion of judicial salaries has demonstrably impaired the corresponding guarantee of lifetime judicial tenure — "the best expedient which can be devised in any government, to secure a steady, upright and impartial administration of the laws." *The Federalist*, No. 78, at 393.

CONCLUSION

This Court should grant the petition for writ of *certiorari*.

Respectfully submitted,

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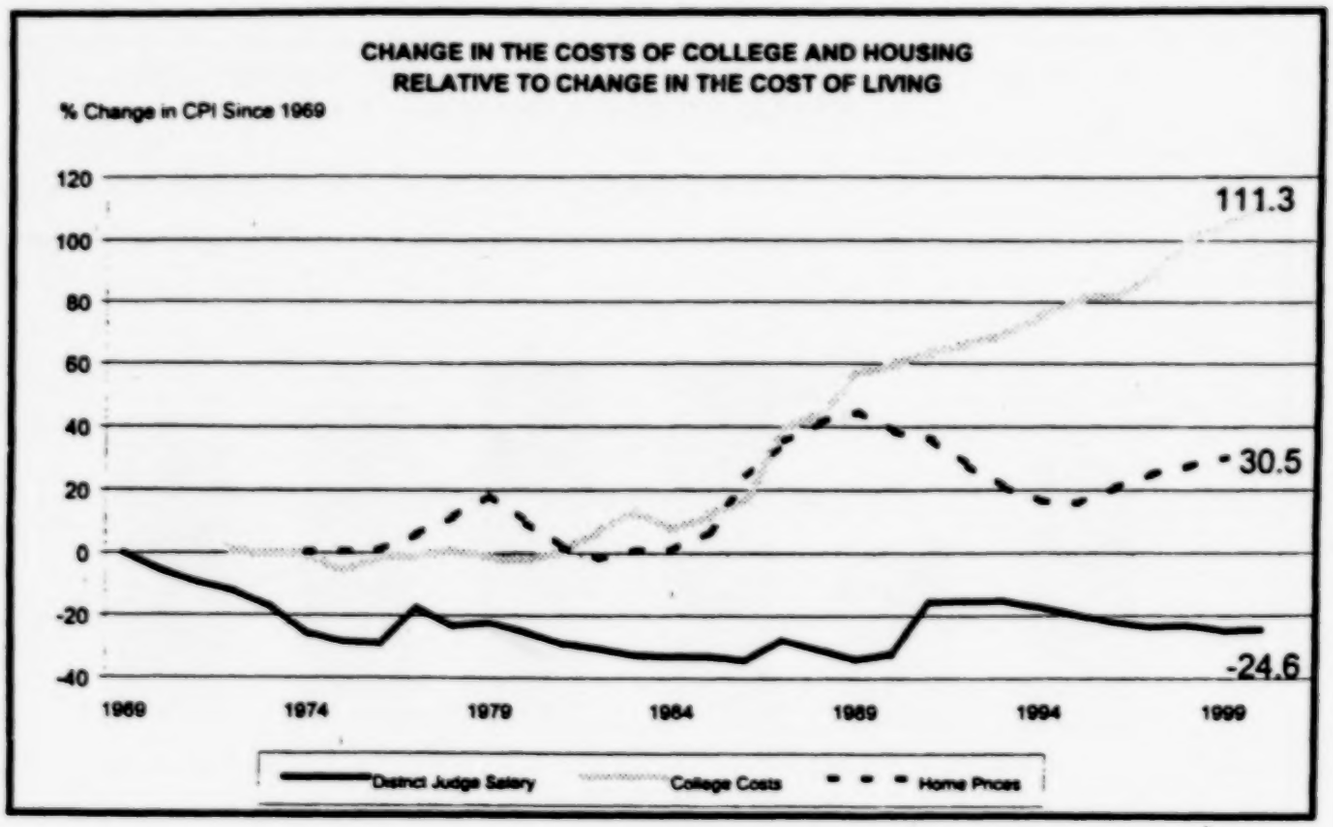
Dated: September 18, 2001

APPENDIX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District Judge Salary
College Costs
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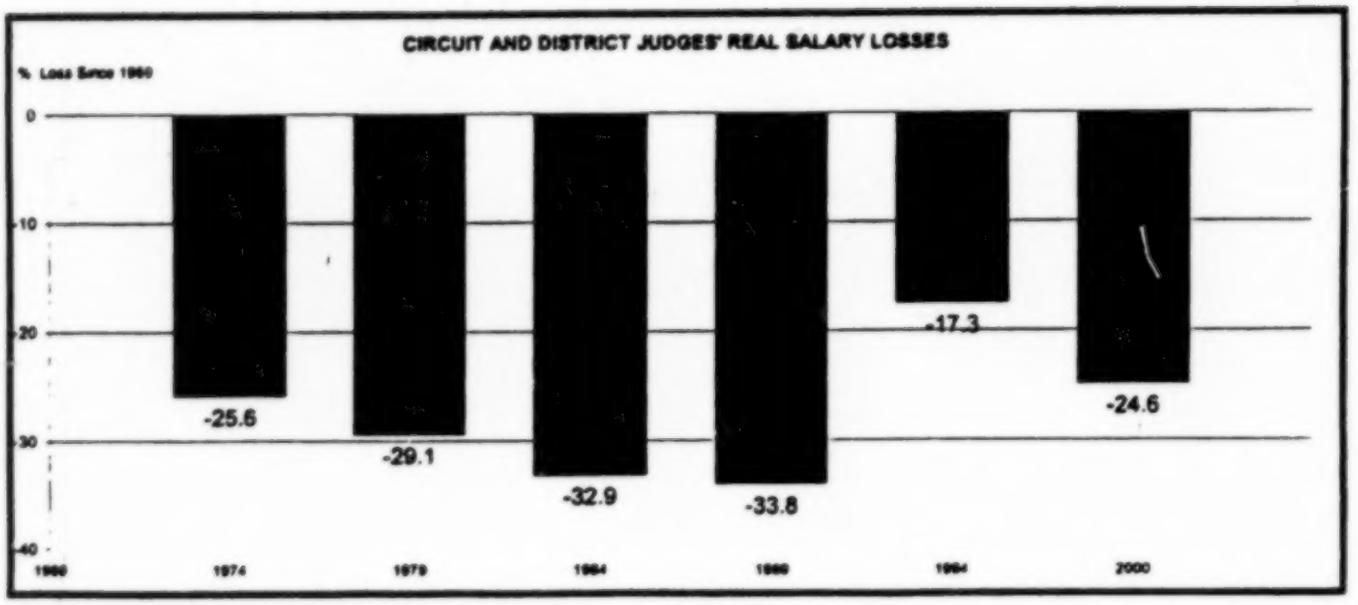

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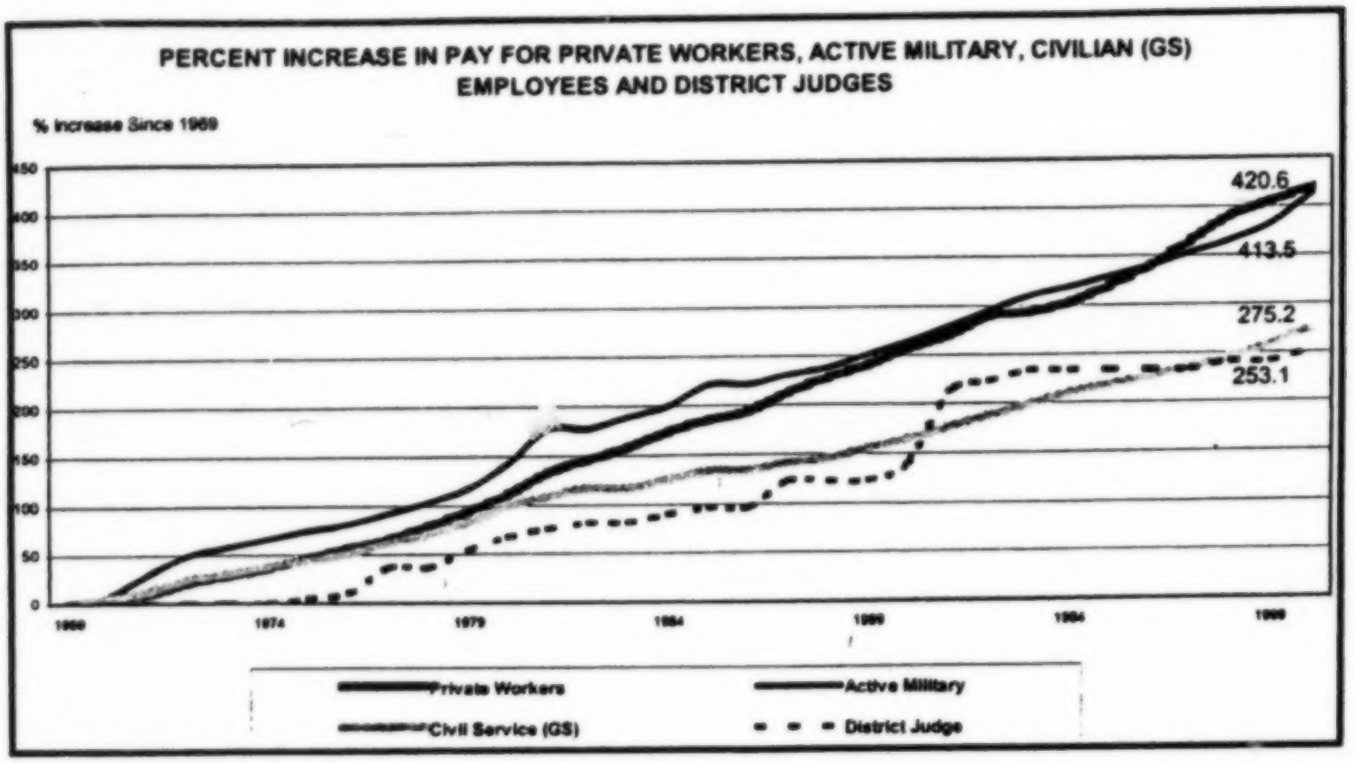

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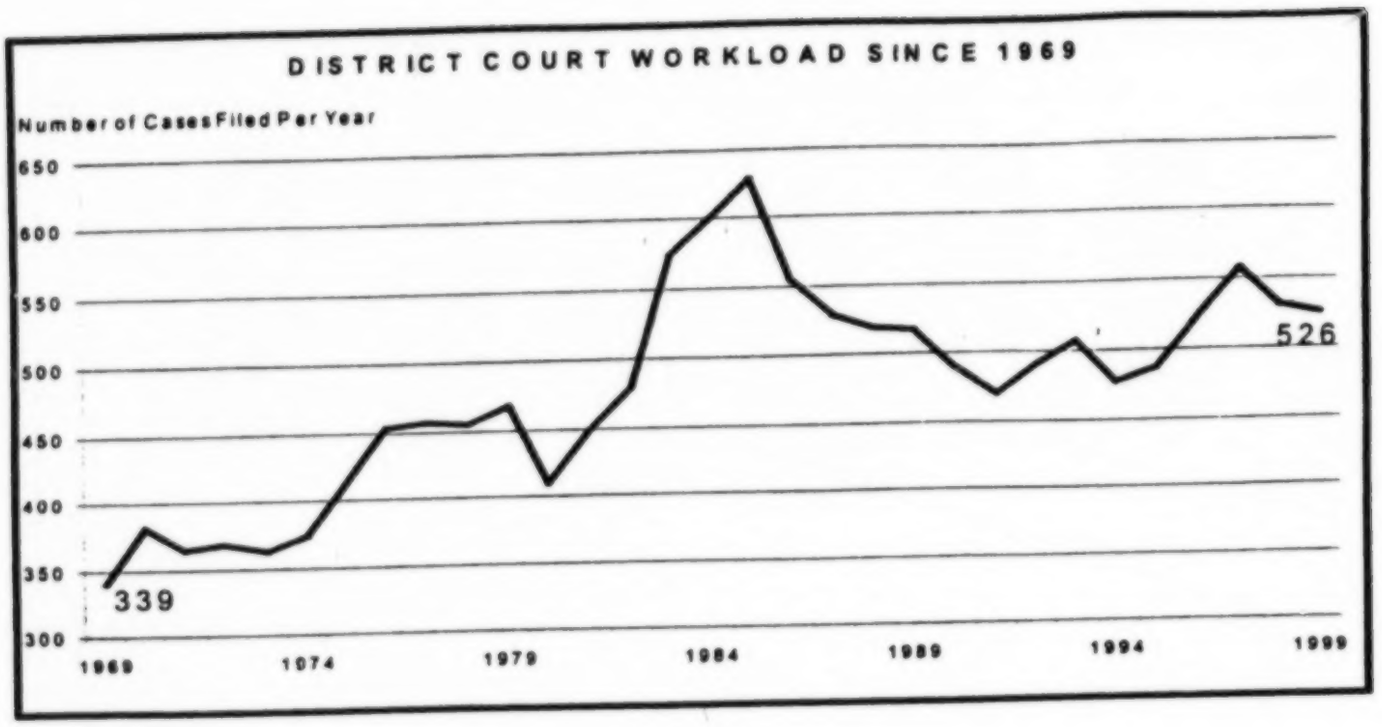

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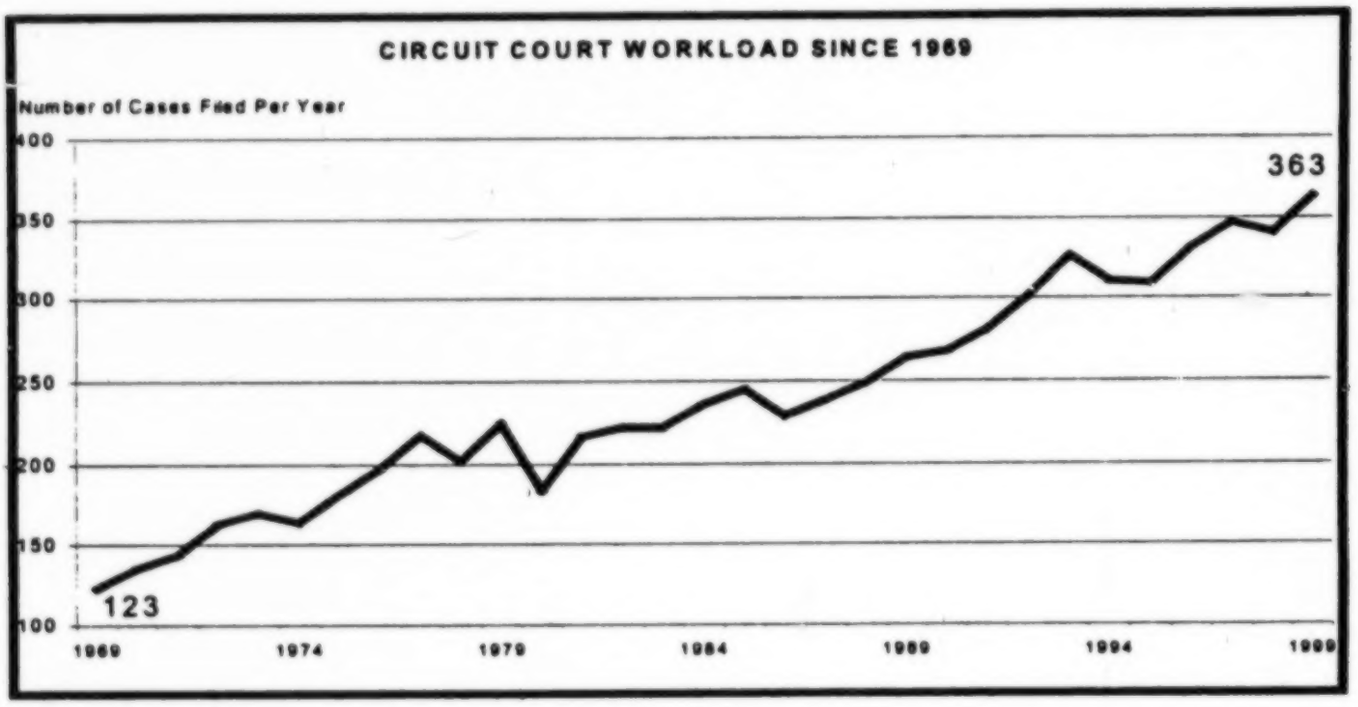

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No. 01-175

IN THE

Supreme Court of the United States

SPENCER WILLIAMS, LOUIS C. BECHTLE, SANDRA S. BECKWITH, WILLIAM MATTHEW BYRNE, JR., ADRIAN G. DUPLANTIER, MORRIS E. LASKER, THOMAS COLLIER PLATT, JR., JOHN W. REYNOLDS, WALTER HERBERT RICE, MARVIN H. SHOOB, JOSEPH L. TAURO, LAUGHLIN E. WATERS, LEE R. WEST, HENRY RUPERT WILHOIT, JR.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF *AMICI CURIAE* OF NATIONAL, STATE AND LOCAL BAR ASSOCIATIONS IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*

The National, State and Local Bar Associations[1] (collectively the "Bar Associations"), are voluntary professional associations representing more than 250,000 lawyers. They are formed in order to provide attorneys in their communities with certain services such as continuing legal education, up-to-date information about changes in the law as well as other programs to assist lawyers and judges in their work. Also, these Bar Associations promote and support various initiatives to maintain the independence of the state and federal judiciary and improve the legal system. The fairness of judicial pay and the overall quality of the federal bench are of utmost concern to the Bar Associations.

The Bar Associations participating as *amici* in the filing of this Brief are as follows:

Boston Bar Association
Chicago Bar Association
Connecticut Bar Association
Federal Bar Association
Federal Bar Council
Illinois State Bar Association
Los Angeles County Bar Association
The Association of the Bar of the City of New York
New York County Lawyers' Association
Ohio State Bar Association
Philadelphia Bar Association
The Bar Association of San Francisco

The bar represented is deeply concerned about the damage caused to a independent judiciary by inadequate compensation and the demoralizing effect of a diminishment of compensation of federal judges in office while other federal employees receive an increase in salary to keep pace with the cost of living. The members of the bar associations represented here observe and have observed first hand the impact this continuing process has on the federal judiciary. We may not expect these highly competent and dedicated individuals

---

1. Pursuant to Sup. Ct. Rule 37.6, the Bar Associations assert that neither Petitioners nor Respondent assisted the Bar Associations or their counsel, in any way (even with expenses), in preparing or submitting this brief. Letters of consent from the parties have been lodged with the Clerk.

to continue to serve as they have in the face of this unnecessary adversity.

SUMMARY

Review should be granted by this Court because the case below presents an important question of federal law that has not been but should be settled by this Court. We believe that the court below decided the question in conflict with Supreme Court decisions.

Twenty federal judges[2] brought this case to challenge the constitutionality of Congressional legislation passed in 1995, 1996, 1997 and 1999 that withheld annual cost-of-living allowances ("COLAs") that were provided for under the Ethics Reform Act of 1989 (the "Ethics Reform Act"). The plain language of the Ethics Reform Act mandates the award of this annual salary adjustment as a form of compensation protected by Article III, section 1 of the United States Constitution. The court below held that the COLA award is an optional event. However, the plain text of the statute and its legislative history entirely refute that suggestion. Judicial interpretation further shows that the promulgation of the Ethics Reform Act instituted a statutory system entirely different from previously-enacted schemes.[3] Further, preventing COLAs from being awarded has, in effect, caused real injury, that is loss of compensation, to federal judges, which violates Article III, section 1 of the Constitution.

The Ethics Reform Act establishes the annual COLA award as a form of judicial compensation that the Compensation Clause unequivocally protects.

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2. Eight of the original twenty judges are deceased.

3. The Ethics Reform Act makes annual pay increases mandatory for federal judges when awarded to other government employees.

REASONS FOR GRANTING THE PETITION

I. The Ethics Reform Act Commands That Federal Judges Be Awarded COLAs As Part Of Their Constitutionally-Protected Compensation

The court below held that Congress could, on a selective basis, block salary increases provided to federal judges by the Ethics Reform Act of 1989 and that to do so did not violate the Compensation Clause of Article III of the Constitution by diminishing the compensation of federal judges while in office. This ruling undermines the constitutional standing as well as the independence of the federal judiciary. It presents an important question of federal law that has not been and should be considered by this Court.

A. Statutory Framework

1. The Ethics Reform Act Of 1989

The Ethics Reform Act, 5 U.S.C. § 5318, was adopted on November 30, 1989, following a three-year period in which the federal judges received no adjustment in pay. The Ethics Reform Act was the result of seven months of hearings and deliberations by a Bipartisan Task Force on Ethics (the "Task Force") appointed by the Speaker and Minority Leader of the House of Representatives.

The main purpose of the Ethics Reform Act was to re-establish the principle that public officials should be paid only by the public. In order to realize this important goal, Congress recognized the need to remove government pay levels from the arena of "politics for hire." In the pay system enacted prior to the Ethics Reform Act, members of Congress supplemented their salaries by taking fees from outside sources as compensation for so-called "private speech making" and for attending meetings of various special interest groups. Congress intended the interplay of provisions comprising the Ethics Reform Act to balance new limitations on outside income with statutorily-mandated wage adjustments.

In enacting the Ethics Reform Act, Congress established an entirely new process for providing annual COLAs to high-level government officials including federal judges. The Ethics Reform Act repealed the discretionary powers previously delegated to the

President (and his agent) in fixing the amount of salary adjustment under the former system. The Ethics Reform Act automatically awards annual COLAs to senior officials and guarantees annual COLAs to the federal judges, whose salaries are protected by the Compensation Clause, so long as General Schedule ("GS") salaries for government employees are adjusted for the same year.

Congress modified the system existing previously to provide that federal judges' rates of pay "shall be adjusted by an amount . . . equal to the percentage of such salary rate which corresponds to the most recent percentage change in the ECI [Employment Cost Index] . . . as determined under section 704(a)(1) of the Reform Act of 1989." The Ethics Reform Act ties federal judges' salaries to a well-recognized index, the ECI, a quarterly index of wages and salaries for private industry workers published by the Bureau of Labor Statistics.[4] The Ethics Reform Act provides for an automatic COLA adjustment as part of the federal judges' constitutionally-protected compensation in any year GS employees receive a cost-of-living increase.

2. The Cancellation Statutes

In 1995, 1996, 1997 and 1999 Congress adopted resolutions, which withheld the scheduled adjustments that were provided for under the Ethics Reform Act.[5] These cancellation statutes were contained in annual appropriations bills and applied only to judges, Members of Congress and other policy-making positions covered by the Executive Schedule.

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4. It provided, however, that under no circumstances would the increase exceed five percent in any year.

5. Treasury, Postal Service and General Government Appropriations Act of 1995 Pub. L. No. 103-329, 630, 108 Stat. 2424 (1994); Treasury, Postal Service and General Government Appropriations Act of 1995 Pub. L. No. 104-52, 633, 109 Stat. 507 (1995); Department of Defense Appropriations Act of 1997 Pub. L. No. 104-208, 110 Stat. 3009 (1996); The Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub L. No. 105-277, 112 Stat. 2681-518 (1998). The Cancellation Statutes correspond to salaries paid in 1995, 1996, 1997 and 1999.

In 1995, 1996, 1997 and 1999, the GS salary rates were adjusted under the Federal Pay Comparability Act of 1970 ("Comparability Act"), 5 U.S.C. § 5303, and government employees received a salary increase for each year based upon the ECI. Federal judges' pay, however, was not adjusted. The Cancellation Statutes acknowledged that the trigger for judges' COLAs under the Comparability Act had taken effect. Nevertheless, the Cancellation Statute enacted in 1994 and blocking the 1995 adjustment, stated that "no adjustment under section 5303 of title 5, United States Code [the Comparability Act], shall be considered to have taken effect in fiscal year 1995 in the rates of basic pay for the statutory pay systems." Pub. L. 103-329, § 630(a)(2). The Cancellation Statutes enacted in 1995, 1996 and 1998 contained identical language.

B. The Plain Language Of The Ethics Reform Act Mandates The Award Of Annual COLAs To Federal Judges

The plain text of the Ethics Reform Act requires the award of annual COLAs with respect to federal judges' compensation.[6] This Act provides in pertinent part:

> [T]he annual rate of pay for positions at each level of the Executive Schedule *shall* be adjusted by an amount . . . equal to the percentage of such annual rate of pay which corresponds to the most recent percentage change in the ECI . . . as determined under section 704(a)(1) of the Ethics Reform Act of 1989.

5 U.S.C. § 5318 note (emphasis added).

The use of the term "shall" in the Ethics Reform Act constitutes a mandatory command with respect to the payment of annual COLAs. The unambiguous language of this Act modifies the previously-enacted Adjustment Act by tying the federal judges' "annual rate of pay" to "the most recent percentage change in the ECI."

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6. Pub. L. No. 101-194, 103 Stat. 1716 (codified at 5 U.S.C. § 5318).

This statutory scheme signaled a radical departure from the previous system under the Executive Salary Cost-of-Living Adjustment Act of 1975 ("Adjustment Act"), 28 U.S.C. § 461. Whereas the Adjustment Act tied the salary adjustment of senior officials to the discretionary review process under the terms of the Comparability Act, the Ethics Reform Act pegs the "annual rate" of judges' salaries to the ECI, an objective cost index. When there is an adjustment in the GS salaries, then the judges are to receive an adjustment as well. In enacting the Ethics Reform Act, Congress detached the living wage of the senior officials from a process, which subjected the determination of their living wages to the political discretion of the President and an independent agent. Instead, Congress created an annual entitlement on the part of those high-level employees encompassed by the Ethics Reform Act.

C. The Ethics Reform Act's Limiting Provisions Require The Award Of Annual COLAs

The comprehensive structure of the Ethics Reform Act indicates that the COLA provision constitutes a statutory requirement. The interwoven scheme of ethics reforms and salary rights comprising the Ethics Reform Act makes the annual COLAs an essential component of a larger scheme to limit the outside income of senior officials. Indeed, the upward adjustment under the COLA provision merely offsets the obvious disadvantage created by the statute's strict provisions limiting the outside income opportunities of high-level employees including federal judges.

These strict provisions severely restrict the outside income options of federal judges. The statute limits federal judges from earning outside income through teaching or writing, limits the receipt of honoraria and imposes mandatory work loads on Senior Judges. Ethics Reform Act, §§ 501(a), 601 and 705. The provisions limiting the options of federal judges by adversely affecting their earning options make it unambiguous that the new system for automatic cost-of-living adjustments established under the Act was "interrelated" to the ban on honoraria and other salary limitations. *Boehner v. Anderson*, 809 F. Supp. 138, 141 (D.D.C. 1992), *aff'g*, 30 F.3d 156 (D.C. Cir. 1994).

Viewed in its entirety, the full structure of the Ethics Reform Act implies that the annual COLA is a form of required compensation, not merely a discretionary adjustment. By instituting a new statutory scheme that balances strict limitations on outside income with the statutory right to a living wage, Congress radically transformed the previously-enacted system. The COLA provision was an integral and required part of this statutory scheme.

It is important to note that while Congress enacted legislation repealing the COLA provision in 1994, 1995, 1996 and 1998, Congress did not relieve judges of the Ethics Reform Act's ban on honoraria and other limits, which were "interrelated" to the COLA provision. *Id.* With respect to federal judges, who are protected by the Compensation Clause of the Constitution against a reduction of compensation while in office, any failure to award the annual COLA constitutes a diminishment of compensation.

D. The Legislative History Of The Ethics Reform Act Supports Petitioners' Position

The legislative history of the Ethics Reform Act is clear — it was the intent of the Act to award automatic annual COLAs to the federal judges as a form of compensation under the terms of the Ethics Reform Act. The court below not only conceded as much but lamented it was not able to carry out the obvious intent because of its view of applicable law. *United States v. Williams*, 240 F.3d 1019, 1031 (Fed. Cir. 2001). The Task Force[7] submitted its report, "Fairness For Our Public Servants," to the House of Representatives on November 15, 1989, which found that the system under the Adjustment Act "only reopened to political gamesmanship what was intended to be a more objective and automatic cost-of-living adjustment." 135 Cong. Rec. H9264 (daily ed. Nov. 21, 1989). As a result, the Task Force determined that the previously-enacted

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7. The Task Force was appointed by Congress to study the system then in place for adjusting the salaries of Executive Level positions and federal judges. The Task Force's conclusions and recommendations led to the enactment of the Ethics Reform Act.

system was incompatible with the need to adjust senior level salaries for inflation.[8]

In addition, the Task Force stated that the award of annual COLAs was an entitlement, not merely an adjustment that the federal judges were eligible to receive:

> Currently, under the provisions of P.L. 94-84 [the prior law], the positions under the Commission's review are *eligible* to receive adjustments in basic pay at the same rate and at the same time as the comparability adjustments for the General Schedule. This Act *provides* annual comparability adjustments for these officials. However, the rate of adjustment would correspond to the percent of change in the Employment Cost Index (ECI), less one half of one percent.

Id. at H9269 (emphases added).

E. Congress' Failure To Award COLAs To Federal Judges In 1995, 1996, 1997 And 1999 Constitutes An Unconstitutional Diminishment Of Judicial Compensation

The Compensation Clause of the United States Constitution unequivocally protects federal judges from a reduction in compensation. It provides in unambiguous terms that federal judges shall "receive for their Services, Compensation, which shall not be diminished during their Continuance in Office." U.S. Const. Art. III., § 1. The purpose of Article III, Section 1, is to protect the

8. The Task Force found that the loss of several annual COLAs forced the Quadrennial Commission on Executive, Legislation and Judicial Salaries to be "in the near-impossible position of recommending politically unacceptable increases, simply to restore lost purchasing power." To redress the growing disparity between top salaries in the government and the private sector, the Task Force recommended that beginning in 1991, "a separate index be used to determine whether or not there should be an annual salary adjustment for these top officials" and that "prospective adjustments be pegged to the rate of change in the Economic Cost Index (ECI), minus one-half a percent (0.5%)." 135 Cong. Rec. H9264 (daily ed. Nov. 21, 1989).

balance of power of the federal government, as it was envisioned under Articles I, II and III of the Constitution. The Compensation Clause preserves the separation of powers among the legislative, executive and judicial branches of the federal government as the Framers saw the need for an independent judiciary and bestowed a special protection in the form of life tenure and irreducible compensation while in office. As Alexander Hamilton explained in *The Federalist* No. 79, "[n]ext to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support."[9]

Even though Congress unquestionably has the power to repeal previously-enacted legislation, and can therefore rescind the 1989 COLAs with respect to the majority of affected federal employees, the Compensation Clause creates a group of Article III federal judges whose salaries are to be protected from political disputes. It thus prevents Congress from repealing the Ethics Reform Act, a statute that guarantees these judges annual COLAs, without providing an alternative that would avoid a diminishment of compensation of judges then in office. The Compensation Clause would not prevent Congress from providing a reduced or different compensation for federal judges not yet in office.

II. Judicial Interpretation Of The Ethics Reform Act Reinforces Petitioners' Position

The court below decided a question of federal law in conflict with existing Supreme Court decisions. This Court should review the decision below for this reason. The decision below is inconsistent with this Court's more recent decision in *Hatter v. United States*, 121 S. Ct. 1782 (2001). In *Hatter*, this Court reaffirmed its earlier decisions that laws with a discriminatory effect on judicial compensation violate the compensation clause. The Cancellation Statues discriminate against the judiciary by reducing the compensation of the judiciary and certain other high level executives, without reducing the compensation of other federal employees.

9. The Federalist No. 79 at 472 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

The court below also misinterpreted this Court's decision in *United States v. Will*, 449 U.S. 200, 101 S. Ct. 471 (1980). *Will* addresses a now-defunct statutory scheme for determining federal judges' salaries, and the Ethics Reform Act is materially different from the legislation analyzed in *Will*. In *Will*, this Court interpreted a statute which "did not . . . alter the compensation of judges; it modified only the formula for determining that compensation." *Will*, 449 U.S. at 227, 101 S. Ct. at 486. The language of the Ethics Reform Act is mandatory in nature. In it, Congress struck a political bargain and erased many other sources of income for high government officials in exchange for annual increases to be awarded when GS salaries are adjusted. Federal judges are entitled to these increases as of the effective date of the 1989 legislation.

A. The Cancellation Statutes Discriminate Against The Judiciary And Thus Violate *Hatter*

Last term, this Court considered the effect of a 1983 law which made participation in the Social Security system voluntary for most federal employees but required certain high-level officials — in particular the judiciary — to pay Social Security taxes. In *Hatter*, this Court held that the law discriminated against the judiciary and thus violated the Compensation Clause. 121 S. Ct. at 1795. This Court held that there was no sound basis for imposing a financial burden on the judiciary when that same burden was not imposed on other federal employees. *Id.* at 1793. "Were the Compensation Clause to permit Congress to enact a discriminatory law . . . it would authorize the Legislature to diminish, or to equalize away, those very characteristics of the Judicial Branch that Article III guarantees . . . ." *Id.* at 1795.

The Cancellation Statues violate the Compensation Clause in the same manner as the Social Security tax addressed in *Hatter*: they discriminate against the judiciary by diminishing the compensation of federal judges without imposing the identical burden on all federal employees. The Cancellation Statutes also create a perception that the Legislature might exercise an impermissible influence over the federal judiciary by reducing their compensation. This Court should be ever vigilant in protecting against violations of

the Compensation Clause to avoid even the appearance that Congress might be permitted to use the threat of Cancellation Statutes to influence the otherwise independent judiciary.

B. *Will* Is Not Dispositive

The court below misapplied the *Will* decision. 449 U.S. 200, 101 S. Ct. 471 (1980). This Court's analysis in *Will* was limited to the previously-enacted scheme under the Adjustment Act. Contrary to the Court's suggestion, *Will* merely underscores the significant distinction between the automatic and mandatory nature of the COLA awards under the Ethics Reform Act and the discretionary system under the Adjustment Act.

In *Will*, thirteen federal district court judges challenged the validity of four repealing statutes that withheld their COLAs in four consecutive years, commencing in 1976. The Court held that statutes, which eliminated COLAs before scheduled salary increases had taken effect, did not violate the Compensation Clause, since these statutes in no sense diminished compensation. However, this Court in *Will* also held that statutes purporting to withhold previously authorized COLAs by repealing salary increases already in force were held to "diminish" the compensation of federal judges in violation of the Compensation Clause.

In the present case, the court below held that because Congress enacted the Cancellation Statutes before January 1 of each calendar year where the COLA increase would be paid, the challenged legislation does not violate the Compensation Clause under *Will*. However, this assumes that the COLA provision of the Ethics Reform Act is similar to the Adjustment Act in that it becomes effective on January 1 of each calendar year, if it is not eliminated before that date. The court below held that the challenged legislation repealing the COLA provisions of the Ethics Reform Act became effective before the adjustments were paid.

The Ethics Reform Act, which was enacted in part to resolve the problems highlighted by the *Will* decision in 1980, is significantly different from the 1975 Adjustment Act. In contrast to the Adjustment Act, the right to COLA awards became effective on January 1,

1991, when the Ethics Reform Act was enacted, and are not subject to the discretion of Congress or the President. In fact, the precise terms of the Cancellation Statutes buttress this construction of the Ethics Reform Act, declaring "no adjustment shall be considered to have taken effect." If the right to the adjustments had not already become law, Congress could have simply declared that the adjustments for the year in question "shall not take effect." Instead, Congress stated that "no adjustment shall be considered to have taken effect," which indicates an acknowledgment that the right to the adjustments had already become law.

In enacting the Ethics Reform Act, Congress purported to redress the very indeterminacy of COLA awards under the Adjustment Act by providing for the automatic adjustment based on the ECI. In *Will*, this Court described the scheme under the Adjustment Act as granting "previously authorized cost-of-living increases initially intended to be automatically operative under the statutory scheme, once the Executive had determined the amount." *Will*, 449 U.S. at 201, 101 S. Ct. at 474. While the COLAs under the Adjustment Act scheme were "initially intended" to be automatic, the COLAs mandated under the Ethics Reform Act actually "took effect" when the Ethics Reform Act was enacted. *Boehner v. Anderson*, 30 F.3d 156 (D.C. Cir. 1994). The Ethics Reform Act eviscerated major provisions of the Salary Act and the Adjustment Act that allowed for discretionary review, and altered the previous statutory scheme so as to render the Salary Act's system of quadrennial review defunct. *Id.* at 159.

Even though it dealt with materially different legislation, the *Will* Court reaffirmed the same special protection afforded by the Compensation Clause to federal judges. The inclusion in the freeze of other officials who are not protected by the Compensation Clause does not insulate a direct diminution in judges' salaries from the clear mandate of that Clause; the Constitution makes no exceptions for "nondiscriminatory" reductions. *Will*, 449 U.S. at 226, 101 S. Ct. at 486. Indeed, Congress is fully empowered to declare that a salary adjustment, which has taken effect as a matter of law, shall not take effect or shall not be considered to take effect for *other*

federal employees. Congress, however, does not have the power to do so as to judges alone under the Compensation Clause.

C. *Boehner* Supports Petitioners' Argument That The Annual Increases In Salary Rate Under The Ethics Reform Act Are Mandatory

In *Boehner*, the D.C. Circuit confirmed the mandatory nature of the COLA provision under the Ethics Reform Act. Congressman Boehner argued that the COLA provisions of the Ethics Reform Act violated the Twenty-Seventh Amendment by increasing congressional pay without required annual legislation and intervening elections.[10] Congressman Boehner argued that the operative date for examining the COLA legislation is "the date upon which the payment of the [COLA] raise first occurs, not the effective date of the statute." *Boehner*, 30 F.3d at 161 (internal quotes omitted). The premise of his argument is that each annual adjustment under the Act was a new law varying the compensation of members of Congress. The defendants including the Department of Justice, the Senate and the House, argued that each annual adjustment was not a new law varying pay because the COLA provisions of the Ethics Reform Act became law in 1989.

The D.C. Circuit held that the Ethics Reform Act did not run afoul of the Twenty-Seventh Amendment because "the COLA provision became law in 1989" and the first COLA was not paid until after the 1990 election and that the 1993 COLA at issue was "fixed by law," "already in force," or "in place" since 1989.[11] *Boehner*, 30 F.3d at 162. *Boehner* thus demonstrates that 1989

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10. The Twenty-Seventh Amendment provides that no law "varying the compensation [of Members of Congress] shall take effect until an election of Representatives shall have intervened." U.S. CONST. amend. XXVII.

11. The *Boehner* Court stated that:

> The Reform Act became a law on November 30, 1989, when the bill, having passed both Houses and been presented to President Bush, he signed it into law. . . . The provision calling for an annual COLA is part of that 1989 law. *Boehner*, 30 F.3d at 161.

was the single effective date for a statutory command requiring annual COLAs by "automatic" operation of the law. Congress' attempts to undo these increases through the Cancellation Statutes it enacted in 1995, 1996, 1997 and 1999 are patently unconstitutional.

In *Will*, this Court struck down statutes which purported to reduce judicial compensation in years where the increases had "taken effect". *Will*, 449 U.S. at 224-225, 230, 101 S. Ct. at 485, 488. The court below agreed with the *Boehner* court that the Ethics Reform Act had taken effect in 1989. *Williams*, 240 F.3d at 1036. But the court below held that the automatic COLA increases had not yet been implemented and, thus, did not vest under the new vesting rules created in this Court's decision in *Will*. In so holding, the court below ignored the substantial differences between the 1975 Adjustment Act — which was the subject of the *Will* decision — and the Ethics Reform Act which was intended to correct the problems addressed in *Will*.

The *Boehner* Court recognized that the adjustments provided for under the Ethics Reform Act are different in form and substance from the adjustments, which were provided for under the 1975 Adjustment Act. Under the Adjustment Act, which was in effect when *Will* was decided, judges were to receive whatever adjustment the President, under his delegated authority, determined should be received by GS employees under the Comparability Act. Until the President acted Judges were merely "eligible" for an adjustment.[12] Under the Ethics Reform Act, by contrast, Congress delegated no authority to the President to make law. Congress established the compensation of judges by law through the adoption of a well-established index, the ECI, postponing only the administrative implementation of subsequent adjustments.

III. Federal Judges Suffer Injury When COLAs Are Withheld

The Court should review the holding below because it has and will have a real impact on the ability of the federal judiciary to carry out its Constitutional role. The Ethics Act of 1989 was intended to address a number of long standing concerns about compensation

12. 135 Cong. Rec. H9269 (daily ed. Nov. 21, 1989).

for the federal judiciary. Federal judges earn relatively modest pay for their demanding workloads.[13] This is particularly true when compared to the salaries that the federal judges could be receiving in private practice. The gap between federal judges' salaries and private practice salaries is great, especially now when work in private practice is "more lucrative than ever."[14] Top base salaries for first-year associates in private law firms have broken the $150,000-per-year mark. There are now first-year associates earning more than federal district court judges and fifth-year associates earning more than the Chief Justice of the Supreme Court (even without annual associate bonuses, which ranged from $25,000 to $55,000 at many firms in 2000).[15] The average partner's compensation among the nation's ten highest-grossing law firms in 2000 was $1,069,000.[16] A partner at one of the ten firms with the nation's highest per-partner compensation in 2000 earned almost double that amount, at $1,819,000.[17]

13. Federal Judicial Pay Erosion: A Report on the Need for Reform, The American Bar Association & The Federal Bar Association (February 2001) at 13. Caseloads for district courts have nearly tripled from 110,778 cases in 1969 to 320,194 cases in 1999. *Id* at 14.

14. The nation's law firms are "particularly healthy" in 1999, "continuing a trend that started in 1995." Profits per partner and associates' salaries at the nation's largest firms "shot up" in 1999. These raises "pale" beside the raises for in-house counsels in top corporations. Margaret Cronin Fisk, *Most Lawyers Benefit from Boom*, NATIONAL LAW JOURNAL, June 14, 1999, at B07.

15. The top salary in the nation offered to the incoming class of associates in the spring of 2001 was $150,000 (offered by Boston's Testa Hurwitz & Thibeault). New York Law Journal, January 4, 2001. New York Law Journal, February 4, 2000.

16. *The Am Law 100*, THE AMERICAN LAWYER (2001). The figure is derived from adding up the average partner compensation for the nation's ten highest-grossing law firms, then dividing the total by ten. The number is rounded to the nearest $1,000.

17. *Id.* at 128.

A. The Canceled COLAs Represent A Loss Of Real Dollars

The federal judges in the present case do not seek salaries commensurate with those paid in private practice. Rather, they ask only for the same yearly increases granted to other government employees to keep up with the rising cost of living. Accordingly, the federal judges should be provided no more (and no less) than the same COLAs granted to other federal employees by the Ethics Act of 1989.

The denial of these COLAs from 1995 through 1999 created a real loss for federal judges. During the years 1995, 1996, 1997 and 1999, the gross domestic product grew respectively by 2.7%, 3.6%, 4.4%, and 4.1%, or 14.8% in the aggregate.[18] The consumer price index increased by 2.5%, 3.3%, 1.7%, and 2.7%, or by a total of 10.2% in the four years. To keep up with these changes, the salaries of most federal employees were adjusted upward. For fiscal years 1995, 1996, 1997, and 1999, GS rates of pay were increased respectively by 2.0%, 2.0%, 2.3%, and 3.1%, or 9.4% in the aggregate.[19] Federal judges, however, did not receive the increases in 1995, 1996, 1997 and 1999 because Congress adopted, and the President signed, resolutions that purported to withhold the adjustments. If the judges had received these adjustments, their salaries would have increased by more than 9.4%[20] by the beginning of 2000, which translates into a total increase of approximately $12,600 for district court judges, $13,300 for circuit judges, $15,500 for Supreme Court associate

18. BUREAU OF ECONOMIC ANALYSIS, (visited Aug. 13, 2001) <http://www.bea.doc.gov>. .

19. THE U.S. OFFICE OF PERSONNEL MANAGEMENT (visited Aug. 10, 2001) <http://www.opm.gov>.

20. This figure (9.4%) and the figures in the table which follows, do not take into account the effect which compounding would have judicial salaries had Congress not purported to withhold the adjustments.

justices, and $16,100 for the Chief Justice.[21] Instead, the judges' salaries have increased only 2.3% since 1995 (as a result of the 2.3% ECI adjustment in January 1998), which is an increase of only about $3,000 for district court judges, $3,300 for circuit judges, $3,800 for Supreme Court associate justices, and $4,000 for the Chief Justice. These facts are summarized in the chart below:

Annual % changes in:	1995	1996	1997	1999	Total Change
Real GDP	2.3	3.4	3.9	3.9	14.80
Consumer Prices	2.5	3.3	1.7	2.7	10.20
GS Salaries	2.0	2.0	2.3	3.1	9.40
Federal Judges' Legal Salaries	2.0	2.0	2.3	3.1	9.40
Federal Judges' Actual Salaries	0	0	0	0	0

The differences in these amounts are not insignificant. For example, federal judges paying for their children's college education, these differences represent the cost of a public university for approximately two semesters or attending a private college for approximately one semester.[22]

21. The figures are derived from multiplying the judges' salaries in 1995 by .094 and rounding the numbers to the nearest $100. The 1995 salaries are assumed to be the same as salaries given in 1997, before the 2.3% ECI adjustment was provided in 1998 (the only adjustment given since 1995). Accordingly, in 1995, a district court judge was paid $133,627, a circuit judge was paid $141,740, a Supreme Court associate justice was paid $164,125, and the Chief Justice was paid $171,457.

22. According to the College Board, the average tuition in 1999-2000 for a four-year private college is $16,332, and for a four-year public college is $3,510. The estimated total expenses for attending a four-year private college for one year is $24,357 and for attending a four-year public college for one year is $10,725. *Paying for College*, THE COLLEGE BOARD (visited August 1, 2001) <http://www.collegeboard.com>.

B. Sub-Standard Judicial Pay Causes Resignations From The Bench

Although Judges have expressed dissatisfaction with their low salaries since the nation's earliest years, Congress' attempts to block further raises can only exacerbate the problem and accelerate the pace of judicial resignations. Of the 127 federal judges who left the bench between 1789 and 1993, 71 of them, or 56% of the total, stated that they left to return to private practice, to engage in other employment, and because of inadequate salary.[23] The number of judges explicitly citing low salary as their reason for resignation has grown dramatically during the past several decades. Judicial resignations due to low pay during the 1970s and 1980s exceeded "all judicial resignations for all reasons combined for the preceding 200 years."[24] Chief Justice Burger, in an interview with the *ABA Journal* in 1985, stated that 43 federal judges had resigned since he took office, with about thirty of them citing "economic reasons" as a large factor. "In our nation's history," he bemoaned, "we have not lost so many able judges by resignation for economic reasons [since 1970]."[25] In the decade of 1961-1970, 5 federal judges resigned from the bench. In the 1990's, 52 resigned.[26]

C. Lagging Judicial Wages Impair The Quality Of The Federal Bench

The problem is not only retaining competent judges but also recruiting competent lawyers to help fill the vacancies. The federal bench is graced with highly competent and dedicated judges but

23. Emily Field Van Tassel, *Why Judges Resign: Influences on Federal Judicial Service*, prepared for the National Commission on Judicial Discipline and Removal (1993), at 14.

24. *Id.* at 15.

25. *Q&A with the Chief Justice*, 71 A.B.A.J. 90 (1985).

26. Federal Judicial Pay Erosion: A Report On The Need For Reform, February 2001, jointly prepared by The American Bar Association and The Federal Bar Association, at p. 16, Chart G.

the quality may not be expected to remain unaffected by a diminishment in wages. The number of lawyers who have declined to be considered for federal judgeships due to low compensation is "undoubtedly far greater" than the number of judges resigning for that reason.[27] "Without a doubt," the *ABA Journal* claimed, federal judges' low salary is "the single most important impediment to a high caliber, independent judiciary."[28] Noting the large number of resignations in the 1970s and 1980s, Chief Justice William Rehnquist warned that fewer judges "will possess the first-rate talent which has always been a hallmark of the federal bench."[29] Morris Harrell, former chairman of the ABA's Commission on Federal Judicial Compensation, noted that "a number of distinguished lawyers . . . could bring their expertise to the judiciary but are not interested because of insufficient compensation."[30] In 1989, a *New York Times* editorial predicted that the "income squeeze would produce more and more federal judges who are rich or who see a judgeship as a brief interlude in professional life."[31]

D. Judicial COLAs Are Not Withheld Because Of Economic Constraints

If federal judges had received the annual COLAs in 1995, 1996, 1997 and 1999 to which they were entitled, the extra sum required to pay their legal salaries would have been a minuscule

27. Emily Field Van Tassel, *Resignations and Removals: A History of Federal Judicial Service — and Disservice — 1789-1992*, 142 U. PA. L. REV. 333, 356 (1993).

28. Collins T. Fitzpatrick, *Depleting the Currency of the Federal Judiciary*, 68 A.B.A.J. 1236 (1982).

29. Bill McAllister, *The Judiciary's 'Quiet Crisis': Prestige Doesn't Pay the Tuition*, THE WASHINGTON POST, Jan. 21, 1987, at A19.

30. Gary A. Hengstler, *Salary Woes: Judges' Pay Still on Hold*, 72 A.B.A.J. 18 (1986).

31. Anthony Lewis, *What Kind of Judges*, THE NEW YORK TIMES, Mar. 9, 1989, at A31.

portion of the federal budget. Funding the 9.40% increase due to the federal judges would have cost approximately $2.4 million. This was less than .00012% of the FY 2001 total federal budget, and only about .009% of the federal budget dedicated to the administration of justice.[32] These figures show that the withholding of the COLAs was not precipitated by economic constraints. On the contrary, the economy performed well during the years that Congress and the President withheld COLAs from the federal judges. Their decision to cancel the COLAs was motivated by political, not legal or economic considerations.

CONCLUSION

For all the foregoing reasons, the petition for certiorari should be granted and the federal judges should be awarded annual COLA adjustments for Fiscal Years 1995, 1996, 1997 and 1999 under the Ethics Reform Act as part of the protected judicial compensation to which they are entitled in accordance with the Compensation Clause of the United States Constitution.

Respectfully submitted,

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32. The figures are derived from the following calculations: (Number of federal judgeships x Amount of salary increase withheld from each judge) / federal budget outlay for 1 year (approximate).

(7)

No. 01-175

IN THE

Supreme Court of the United States

SPENCER WILLIAMS, LOUIS C. BECHTLE,
SANDRA S. BECKWITH, WILLIAM MATTHEW BYRNE, JR.,
ADRIAN G. DUPLANTIER, MORRIS E. LASKER,
THOMAS COLLIER PLATT, JR., JOHN W. REYNOLDS,
WALTER HERBERT RICE, MARVIN H. SHOOB,
JOSEPH L. TAURO, LAUGHLIN E. WATERS,
LEE R. WEST AND HENRY RUPERT WILHOIT, JR.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF AMICUS CURIAE OF THE AMERICAN COLLEGE OF TRIAL LAWYERS IN SUPPORT OF PETITIONERS

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BRIEF AMICUS CURIAE OF THE AMERICAN COLLEGE OF TRIAL LAWYERS IN SUPPORT OF PETITIONERS

The American College of Trial Lawyers files this brief as *amicus curiae* pursuant to the written consent of the parties.[1]

INTEREST OF THE AMICUS CURIAE

The American College of Trial Lawyers (the "College") has for more than fifty years sought to improve and enhance the standards of trial practice, the administration of justice, and the ethics of the profession. Membership in the College is by invitation. The College strives to induct as Fellows lawyers from the top rank of the trial bar in the United States and Canada. The College limits membership to one percent of the number of persons admitted to practice in any particular state or province. To qualify as a Fellow, a lawyer must have at least fifteen years of trial experience.

The College first approved a Code of Trial Conduct in 1956, which has been revised and updated periodically. One of the fundamental tenets of the Code is a commitment by the Fellows of the College to be vigilant in the maintenance of the dignity and independence of the judiciary. The College's commitment to judicial independence has been demonstrated in the past by providing funding for a Report to the 1986 Interim Commission on Executive, Legislative and Judicial Salaries, entitled *Promises Made, Promises Still Unkept: Restoration of Inflation-Induced Salary Cuts for Top Government Officials* (October 1, 1986).

The decision below strikes at the heart of our nation's ability to be guaranteed an independent judiciary, free of legislative turmoil and coercion. The threat to the nation's quality of justice is significant, and the diminution of salary which has occurred cannot be countenanced. The College files this brief *amicus curiae* to present the broad policy considerations with which it is particularly

1. Letters from all parties consenting to the filing of this brief have been filed with the Clerk of this Court. Pursuant to Rule 37.6 of the Supreme Court of the United States, *amicus curiae* states that this brief was not prepared, written, funded or produced by any person or entity other than *amicus curiae* and its counsel.

concerned and its view concerning the negative impact of the decision by the Court of Appeals.

REASON FOR GRANTING THE WRIT

The so-called "blocking statutes"[2] challenged by Petitioners raise a serious concern under the Compensation Clause meriting this Court's attention because the blocking statutes had the effect of reducing the salaries of federal judges below levels approved by law, while the salaries of the vast majority of federal employees were not similarly reduced. As is explained in more detail in the Petition for Writ of Certiorari, Congress provided in the Ethics Reform Act of 1989[3] that federal judges would receive cost of living adjustments ("COLAs") in any year in which the salaries of General Schedule employees were adjusted under the Federal Pay Comparability Act. In fiscal years 1995, 1996, 1997, and 1999, the overwhelming majority of federal employees received COLAs because the salaries of General Schedule employees were adjusted. Congress blocked federal judges from receiving the COLAs authorized by law by adopting resolutions, which the President signed — the blocking statutes. In light of the historical importance of the Compensation Clause in protecting the independence of the judiciary and this Court's decision in *Hatter v. United States*, 121 S. Ct. 1782 (2001), blocking the judiciary from obtaining a salary adjustment received by almost every other federal employee discriminates against the judiciary in violation of Article III. This Court should grant the writ to consider the important constitutional issues raised by the blocking statutes.

2. The "blocking statutes" are those statutes by which Congress prevented from going into effect the cost of living adjustments which otherwise would have automatically increased the base pay of the judiciary. *See* Appendix to the Petition for Writ of Certiorari at 4.

3. Pub. L. No. 101-194, 103 Stat. 1716 (1989).

I. CONGRESS AND THE COURT BELOW STRAYED FAR FROM THE COMPENSATION CLAUSE'S HISTORICAL PURPOSES OF MAINTAINING AN INDEPENDENT JUDICIARY AND ENSURING SEPARATION OF POWERS AMONG THE BRANCHES OF GOVERNMENT, AND THIS COURT SHOULD GRANT REVIEW TO REINFORCE THE HISTORICAL INDEPENDENCE OF THE JUDICIARY.

The Compensation Clause seeks to maintain the independence of the judiciary and is a critical element of the Constitution's system of checks and balances.[4] Judicial autonomy is crucial to the proper functioning of the Constitution's allocation of powers because impartial and independent judges are required to determine whether the government's assertion of power against a citizen is consistent with the Constitution. As Alexander Hamilton observed, "the judiciary is beyond comparison the weakest of the three departments of power,"[5] and thus special vigilance is needed to prevent even the slightest erosion of the separation between the judiciary and the other branches of the government. By allowing Congress to reduce judicial pay below levels that previously had been enacted into law, the Federal Circuit's decision has significantly weakened the structural protection that the Compensation Clause gives to the independence of the judiciary. A brief review of the historical origins of the Compensation Clause demonstrates the error below and why this case involves important issues that deserve resolution by this Court.

Separating judges from the political branches of government is a longstanding tradition of the Anglo-American system of law. Structural protections for the independence of the judiciary were enacted as a correction to the abuses of the Stuart kings of England, who had freely removed judges who issued opinions with which the

4. Article III, Section 1 provides in relevant part: "[t]he Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office."

5. *The Federalist* No. 78, at 437 (Alexander Hamilton) (Isaac Krammick ed., 1987).

monarch disagreed.[6] As part of the Settlement Act of 1701, which established the succession to the English throne after the death of Princess Anne, it was provided that "judges commissions be made *quamdiu se bene gesserint* [during good behavior], and their salaries ascertained and established; but upon the address of both Houses of Parliament it may be lawful to remove them. . . ." 12 & 13 Will. III, ch. 2, § III, cl. 7 (1701). This language was the direct source for Article III's command that judges "shall hold their Offices during good Behaviour." U.S. Const. art. III, § 1. In 1760, Parliament passed another act to strengthen the independence of the bench by providing that a judge's salary would not be decreased "so long as the Patents and Commissions of them, or any of them respectively, shall continue and remain in force." 1 Geo. III, ch. 23, § 111 (1760). Blackstone praised judicial independence as "preservative of the public liberty" and commented that liberty cannot "subsist long in any state, unless the administration of common justice be in some degree separated both from the legislative and also from the executive power." William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765-1769* 1:259-60 (1979).

While originally these protections of judicial salary and tenure applied to colonial judges, in 1761 "the King converted the tenure of colonial judges to service at his pleasure." *United States v. Will*, 449 U.S. 200, 219 (1980). Subjecting colonial judges to the whims and caprices of the King was one of the royal abuses cited in the Declaration of Independence, which denounced the King for making "[j]udges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." The Declaration of Independence paras. 10 & 11 (U.S. 1776).

When the delegates to the Constitutional Convention met in 1787 to frame a new charter for the national government, they drew upon more than their colonial experiences. In the decade after the

6. The first two Stuart kings, James I and Charles I, dismissed Chief Justices Coke and Crew, respectively, when they tried to limit the royal prerogative in their decisions and assert the autonomy of the courts and the supremacy of the common law. *Atkins v. United States*, 556 F.2d 1028, 1048 (Ct. Cl. 1977) (*citing* J.R. Tanner, *English Constitutional Conflicts of the Seventeenth Century 1603-1689* 40, 60 (1971)).

Revolution, according to one commentator, "the judiciary in many states was made subservient to the state legislature. . . . Judicial appointments and terms of service were controlled by legislatures, as were salaries and fees. State legislatures regularly overturned judicial findings and often took over traditional judicial duties such as rulings on probate, debt and even marriage and divorce." Isaac Krammick, Introduction, *The Federalist Papers* 22 (Isaac Krammick ed., 1987). The post-Revolutionary decade convinced the founders that a strong national government and an independent judiciary were necessary to preserve the Union. As one prominent scholar has written:

> It took a decade of experience under the state constitutions to expose the triple danger that so alarmed Madison in 1787: first, that abuse of the legislative power was more ominous than arbitrary acts of the executive; second, that the true problem of rights was less to protect the ruled from their rulers than to defend minorities and individuals against factious popular majorities acting through government; and third, that agencies of central government were less dangerous than state and local despotisms.

Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 290 (1996). Judicial independence was one of the crucial checks upon legislative power that would be vital to the new national framework.

To protect the judiciary from encroachments from the other two branches of government, the Convention went even further than the British system. The delegates rejected a proposal by John Dickinson of Pennsylvania to allow the removal of judges by a joint address of Congress.[7] James Wilson, one of the principal drafters of Article III, who opposed the proposal, stated:

> Such a provision in the British government is less dangerous than here, the House of Lords and House of Commons being less likely to concur on the same occasions. Chief Justice Holt, he remarked, had succes-

7. Todd Peterson, *Controlling the Federal Courts Through the Appropriations Process*, 1998 Wis. L. Rev. 993, 1020 (1998).

> sively offended by his independent conduct both houses of parliament. Had this happened at the same time, he would have been ousted. The judges would be in a bad situation if made to depend on every gust of faction which might prevail in the two branches of our government.[8]

Thus, the founders inserted two clauses into the Constitution to protect the judiciary's autonomy: a clause providing that judges "shall hold their Offices during good Behaviour," and a clause requiring that judges shall "receive for their Services a Compensation, which shall not be diminished during their Continuance in Office." U.S. Const. art. III, § 1. As this Court explained, after reviewing the history leading up to the adoption of these clauses: "[i]n framing the Constitution, therefore, the power to diminish the compensation of the federal judges was explicitly denied, in order, inter alia, that their judgment or action might never be swayed in the slightest degree by the temptation to cultivate the favor or avoid the displeasure of that department which, as master of the purse, would otherwise hold the power to reduce their means of support." *O'Donoghue v. United States*, 289 U.S. 516, 531 (1933).

The importance of judicial independence, and the function of these clauses in maintaining judicial independence, was explained after the convention by Alexander Hamilton in the Federalist Papers. First, the judiciary, because of its relative lack of power, was the branch in most danger of being co-opted by one of the other branches of government. As Hamilton observed, the judiciary, because it has "no influence over either the sword or the purse," has "neither FORCE nor WILL but merely judgement." *The Federalist* No. 78, at 437 (Alexander Hamilton)(Isaac Krammick ed., 1987). Because the judiciary would be "in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches," all possible care was necessary to protect its independence. *Id.* at 438.

Second, judicial autonomy is particularly important because judges have the power to declare laws unconstitutional. Hamilton pointed out that the Constitution is a "limited Constitution," by

8. *The Constitutional Convention and the Formation of the Union* 336-337 (Winton U. Solberg ed., 2d ed. 1990) (quoting Madison's Constitutional Convention notes).

which he meant that it placed certain restrictions on Congress's powers. "Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void." *Id.* at 438. Striking down the acts of another branch of government by the branch that already is the weakest would be, as Hamilton said, an "arduous" duty, and so preserving the "independent spirit" of judges would be necessary. *Id.* at 440.

Third, an independent judiciary is necessary to protect minorities from the "unjust and partial" actions of the majority. The framers of the Constitution were particularly concerned with the excesses of the post-Revolutionary state legislatures, and they considered an independent judiciary essential in preventing majorities from trampling on the rights of unpopular individuals. Judges would need to be safe from the retaliation or control of the other branches of government if they were to have the fortitude to take unpopular but correct actions, such as declaring laws unconstitutional or upholding the rights of minorities. "The benefits of the integrity and moderation of the judiciary have already been felt in more States than one. . . . Considerate men of every description ought to prize whatever will tend to beget or fortify that temper in the courts: as no man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be a gainer today." *Id.* at 441.

Finally, and perhaps most importantly in this case, Hamilton noted that judicial independence would be necessary to assemble a qualified and skilled bench. Hamilton's prophetic observation about the difficulty of attracting able judges is worth repeating:

> It has been frequently remarked . . . that a voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government. To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents . . . ; and it will readily be conceived from the variety of controversies which grow out of the folly and wickedness of mankind that the records of those precedents must unavoidably swell to a very considerable bulk and must demand long and

> laborious study to acquire a competent knowledge of them. Hence it is that there can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges. . . . [A] temporary duration in office which would naturally discourage such characters from quitting a lucrative line of practice to accept a seat on the bench would have a tendency to throw the administration of justice into hands less able and less well qualified to conduct it with utility and dignity.

Id. at 441-42.

Hamilton believed that the Compensation Clause played a crucial part in ensuring the independence of the judiciary. As he stated emphatically, "[n]ext to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. . . . *[A] power over a man's subsistence amounts to a power over his will.*" *The Federalist* No. 79, at 442-43 (Alexander Hamilton)(Isaac Krammick ed., 1987) (emphasis in original).

Hamilton was not alone in stressing the importance of judicial independence and the Compensation Clause, as this Court explained in *Evans v. Gore*, 253 U.S. 245 (1920). Other contemporaries also commented upon the importance of protecting judicial salaries from being reduced. Judge Story, for instance, stated that judicial independence would be a "mere mockery" without the protection of the Compensation Clause, and Chancellor Kent observed that it is necessary to induce lawyers "to quit the lucrative pursuits of private business" to become judges. *Id.* at 253.

These early commentators also emphasized more generally the importance of keeping the judiciary out of the political arena. James Wilson noted that if judges were not independent from the political branches, justice would suffer:

> But how can society be maintained — how can a state expect to enjoy peace and order, unless the administration of justice is able and impartial? Can such an administration be expected, unless the judges can maintain dignified and independent characters? Can dignity and independence be expected from judges, who

> are liable to be tossed about by every veering gale of politicks, and who can be secured from destruction, only by dexterously swimming along with every successive tide of party?

Wilson, 1 *The Works of James Wilson* 296-97 (Robert Green McCloskey, ed., Belknap Press, 1967). Chief Justice Marshall stated that "the greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people was an ignorant, a corrupt, or a dependent judiciary." Proceedings and Debates of the Virginia State Convention of 1829-1830, pp. 616, 619 (1830).

Subsequent history has shown the importance of preserving the independence of the judicial branch. For example, in 1805, Supreme Court Justice Samuel Chase was impeached by the House of Representatives both for his political views and because of his demeanor as a judge. Although most observers agreed that Justice Chase was overbearing and arrogant, it is doubtful that he was actually guilty of "high crimes and misdemeanors," and his acquittal helped safeguard the future independence of the Court by setting a precedent that judges would not be removed solely because of their political views.[9] In the next two centuries, there have been repeated, albeit unsuccessful, assaults on the independence of the judiciary, from President Roosevelt's attempt to "pack" the Supreme Court in the 1930's to laws tha. encroach upon the authority of this Court. *See, e.g., City of Boerne v. Flores*, 521 U.S. 507, 535-36 (1997). These experiences confirm the vital importance of judicial independence to the American system of government.

Today, those attacks continue, demonstrating once again the wisdom of the Founding Fathers in seeking to assure judicial independence. The importance of lifetime tenure of federal judges in preserving a judiciary that will protect the individual in the face of contrary popular opinion has been repeatedly underscored when unpopular judicial decisions give rise to attacks in the Congress and the media on the judges who authored them.[10] More relevant to the

9. *See generally* William H. Rehnquist, *Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson* (1999).

10. *See* Louis H. Pollak, *Criticizing Judges*, 79 Judicature 299 (1996); *see also* Kerry Hill, *Judges Under Fire at* http://www.ajs.org/cji/fire.html (last visited August 16, 2001).

current case, at a time when federal judicial salaries suffer by comparison to the salaries paid by some law firms to recent law school graduates, the statutes challenged by Petitioners, and the decision below enforcing those statutes, have resulted in a real decline in the compensation received by federal judges. As demonstrated by the Brief of American Bar Association as Amicus Curiae Supporting Petitioners, these economic realities have created an environment in which persons who care about the administration of justice, such as the members of the College, have cause to share the Founding Fathers' concern about the magnetic effect of a "lucrative line of practice" in discouraging qualified lawyers from accepting appointment to, or remaining on, the federal bench. Accordingly, this case involves an important issue concerning whether Congress through the blocking statutes has violated the Compensation Clause, and this Court should grant certiorari to address it.

II. REVIEW SHOULD BE GRANTED BECAUSE THE DECISION BELOW IS INCONSISTENT WITH THIS COURT'S PRECEDENTS INTERPRETING THE COMPENSATION CLAUSE TO PROHIBIT CONGRESS FROM PASSING LAWS THAT HAVE A DISCRIMINATORY EFFECT ON THE COMPENSATION OF THE JUDICIARY.

Review is also warranted to address the inconsistency between the decision below and this Court's decisions, most recently in *Hatter v. United States*, 121 S. Ct. 1782 (2001), holding that laws with a discriminatory effect on judicial compensation violate the Compensation Clause. The blocking statutes, which had the effect of reducing authorized judicial compensation while the compensation of virtually all other federal employees was not reduced, effect the kind of discrimination barred by the Compensation Clause and *Hatter*. This discrimination should be addressed and remedied to safeguard the independence of the judiciary.

As Chief Judge Mayer stated below, to maintain judicial independence and attract well-qualified people to the bench, this Court "has broadly interpreted the Compensation Clause to protect against the remotest influence, direct or indirect, by the other branches of government." (Appendix to the Petition for Writ of

Certiorari at 152 (Mayer, C.J., dissenting from the order declining hearing en banc)). Although the Compensation Clause's prohibition against diminishing judicial compensation is so clear and absolute that it was rarely at issue in the nineteenth century, the increasingly complex federal laws affecting judicial compensation in the twentieth century have raised questions under the Compensation Clause necessitating resolution. Most of the Court's Compensation Clause decisions have involved laws of general application that directly or indirectly reduced federal judges' compensation. The Court has held that judges are not immune from federal laws of general application that have the indirect effect of reducing their compensation, but that Congress may not pass laws that discriminate against the judiciary in comparison to the citizenry at large or other federal employees.

The principle that Congress may not discriminate against the judiciary in matters affecting compensation first arose in a tax case. In *Evans v. Gore*, 253 U.S. 245 (1920), a federal judge challenged the application of a federal income tax enacted after the judge joined the bench. The Court reviewed the history of the Compensation Clause and found that the primary purpose of the Clause was "to attract good and competent men to the bench and to promote that independence of action and judgment which is essential to the maintenance of the guaranties, limitations, and pervading principles of the Constitution. . . ." *Id.* at 253. The Court held that the tax was an unconstitutional diminution of the judge's salary. *Id.* at 263-64. Dissenting Justice Holmes, joined by Justice Brandeis, acknowledged the importance of protecting the salaries of judges from diminution "to secure the independence of judges." *Id.* at 265 (Holmes, J., dissenting). He concluded, nonetheless, that the Compensation Clause provided "no reason for exonerating [a judge] from the ordinary duties of a citizen." *Id.* The Court subsequently extended the holding of *Evans* to all federal taxes, whether enacted before or after a judge was appointed, in *Miles v. Graham*, 268 U.S. 501 (1925).

Miles was roundly criticized, and the Court subsequently overruled it in *O'Malley v. Woodrough*, 307 U.S. 277 (1939), which held that a non-discriminatory federal income tax of general application does not violate the Compensation Clause. The Court

explained that "[t]o subject [judges] to a general tax is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering." *Id.* at 282. Implicit in the reasoning of *O'Malley* is that a law of general application is constitutional, but a discriminatory law — one whose indirect reduction of judicial pay did not apply generally — violates the Compensation Clause.

Last Term, this Court expanded upon the reasoning of *O'Malley* in *Hatter v. United States*, 121 S. Ct. 1782 (2001), and held that "the [Compensation] Clause does not prevent Congress from imposing a 'nondiscriminatory tax laid generally' upon judges and other citizens, but it does prohibit taxation that singles out judges for specially unfavorable treatment." *Id.* at 1787 (citation omitted). *Hatter* concerned the 1983 extension of Medicare and Social Security taxes to federal employees, including judges. The Court first overruled *Evans* but reaffirmed its explanation of the importance of the Compensation Clause in maintaining judicial independence. The Court stressed that the Clause helps "to secure an independence of mind and spirit necessary if judges are 'to maintain that nice adjustment between individual rights and governmental powers which constitutes political liberty.'" *Id.* at 1791 (quoting W. Wilson, *Constitutional Government in the United States* 143 (1911)). The Court disagreed with *Evans* only in its application of the Clause to "a nondiscriminatory tax that treated judges the same way it treated other citizens." *Id.* at 1792. The Court quoted with approval the dissent of Justice Holmes, which reasoned: "'[t]o require a man to pay the taxes that all other men have to pay cannot possibly be made an instrument to attack his independence as a judge.'" *Id.* (quoting *Evans*, 253 U.S. at 265 (Holmes, J., dissenting)). The Court therefore concluded that subjecting judges, like all other federal employees, to Medicare taxes was not discriminatory and thus was constitutional. *Id.* at 1792-93.

The Court came to the opposite conclusion regarding the extension of Social Security taxes to federal judges. The 1983 law made it voluntary for most current federal employees to participate

in the Social Security system, but required certain high level federal employees, including federal judges, to pay Social Security taxes. *Id.* at 1787-88. The new law, however, created an exception to the exception by allowing any high-level employee who participated in a contributory retirement program to modify his or her participation in a manner that left the employee's total payroll deduction — for retirement and Social Security — unchanged. *Id.* Those who did not participate in such a contributory retirement program, however, had Social Security taxes deducted from their paychecks — and practically the only persons in this last category were federal judges. *Id.* at 1789.

After reviewing these features of the law, the Court found that the law discriminated against judges and thus violated the Compensation Clause. The Court gave several reasons for its conclusion. First, because federal employees — including judges — had remained outside the Social Security system for nearly fifty years, federal employees, rather than the public at large, were the proper class against which to measure when determining whether the law discriminated against judges. *Id.* at 1793. Second, the law applied a new financial burden upon sitting judges but, as a practical matter, did not impose that burden upon any other federal employees. *Id.* Third, the Court held that the Government's justification for the statutory distinction between judges and other federal employees was "unsound." *Id.* The Court noted that the judicial retirement system is noncontributory (that is, judges are not required to contribute any portion of their salary towards it) because judges, due to their life tenure, may continue to draw their salary for life; thus a contributory system would not work. The fact that judge's pensions were not contributory could not justify the unequal treatment because the Compensation Clause does not allow "taxes which have the effect of weakening or eliminating those constitutional guarantees necessary to secure judicial independence, at least insofar as similar guarantees are not enjoyed by others." *Id.* at 1794. These factors led the Court to conclude that "the 1983 Social Security tax law discriminates against the Judicial Branch, in violation of the Compensation Clause." *Id.* at 1795.

The Court also rejected two other justifications offered by the Government for the unequal treatment afforded by the Social

Security law. First, the Court rejected the argument that proof of discriminatory intent was required to establish a Compensation Clause violation:

> The Government also argues that there is no evidence here that Congress singled out judges for special treatment in order to intimidate, influence, or punish them. But this Court has never insisted upon such evidence. To require it is to invite legislative efforts that embody, but lack evidence of, some such intent, engendering suspicion among the branches and consequently undermining that mutual respect that the Constitution demands. . . . Nothing in the record discloses anything other than benign congressional motives. If the Compensation Clause is to offer meaningful protection, however, we cannot limit that protection to instances in which the Legislature manifests, say, direct hostility to the Judiciary.

Id. at 1795-96 (citation omitted). Second, the Court rejected the claim that the law was not discriminatory in violation of the Compensation Clause simply because it also disfavored the President and potentially certain Legislative Branch employees. *Id.* at 1796. Under *Hatter*, a law that treats the compensation of the judiciary unfavorably when compared to the vast majority of other federal employees is forbidden by Article III.

Although *Hatter* concerns the taxation of judicial salaries, the logic of its holding applies with even more force to Congress's treatment of more directly affected judicial compensation. *See Atkins v. United States*, 556 F.2d 1028 (Ct. Cl. 1977) (analyzing whether law directly affecting judicial compensation was discriminatory in violation of the Compensation Clause). In *Hatter*, the Court stated that "[w]ere the Compensation Clause to permit Congress to enact a discriminatory law . . . it would authorize the Legislature to diminish, or to equalize away, those very characteristics of the Judicial Branch that Article III guarantees — characteristics which, as we have said, the public needs to secure that judicial independence upon which its rights depend." *Hatter*, 121 S. Ct. at 1795. The clear import of *Hatter* and this Court's Compensation Clause jurisprudence is that the Clause bars any direct or indirect reduction in judicial compensation, with the only

exception being made for a law, such as the federal income tax, that applies to all citizens. If a law indirectly reduces the compensation of judges and does not have the same effect on a larger group, then the law is discriminatory and in violation of the Compensation Clause.

The blocking statutes raise the same Compensation Clause problem posed by the Social Security tax at issue in *Hatter*. Both single out the judiciary for unfavorable treatment. Both have the effect of reducing the salaries of federal judges, along with a small handful of other employees, whereas the vast majority of federal employees did not have their salaries reduced. Both adversely affected the federal judiciary. Although in neither *Hatter* nor this case is there proof that Congress actually had discriminatory animus, such proof is not necessary. *Hatter*, 121 S. Ct. at 1795-96.[11] The numerous similarities between the laws at issue here and the Social Security tax at issue in *Hatter*, a case not decided until after the decision of the panel below,[12] demonstrates that this case merits review by this Court.

The fact that the blocking statutes also applied to Congress and a few high level executive employees does not render them permissible under the Compensation Clause, for several reasons. First, taxes and other laws that reduce compensation are permissible under the Clause only if they are laws of *general* application that impose upon judges the same burdens imposed upon other citizens. The blocking statutes are not such laws because they apply to only a few officials and do not disadvantage the general population of federal employees. In effect, the blocking statutes impose the burden of not receiving a cost of living adjustment on judges, along with a few others, but do not impose that same burden on the vast majority of federal employees.

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11. This Court's decision in *United States v. Will*, 449 U.S. 200 (1980), does not answer the Compensation Clause problem posed by the blocking statutes for two primary reasons. First, the *Will* Court did not consider whether the statutes at issue discriminated against the judiciary. Second, as is explained in the Petition for Writ of Certiorari, there are significant differences between the statutes at issue in *Will* and the blocking statutes.

12. After *Hatter* was decided, the judges below submitted a second petition for rehearing to the court en banc, but the court denied the petition. *See* Appendix to the Petition for Writ of Certiorari at 167-68.

Second, the Court found in *Hatter* that the application of Social Security taxes to judges was discriminatory even though the President and potentially certain legislative employees were also affected. The Court found that the inclusion of a few other employees did not make a "critical difference." Similarly, the mere inclusion within the blocking statutes of Congressional pay raises, which are fraught with the politics from which the judiciary should be separated, does not justify treating the federal judiciary differently.

Third, there is a crucial difference between the judiciary on the one hand, and Congress and high-level executive employees on the other. Members of Congress and senior executive employees both belong to the two political branches of government. Both branches have control over their salaries, since federal salaries must be approved by Congress and are subject to the executive veto.[13] By contrast, the judiciary is not a political branch and holds no power to affect its salary in any way. The linkage between Congressional and judicial pay has no justification other than convenience and political expediency, and convenience cannot validate the discrimination that this linkage perpetuates.

Finally, far from assuaging Compensation Clause concerns, the linkage of Congressional and judicial pay causes the kinds of concerns about judicial independence that the Compensation Clause is designed to prevent. Again, these concerns were best expressed by James Wilson, who warned that judges could not be independent if they were "liable to be tossed about by every veering gale of politicks,"[14] and that "[t]he judges would be in a bad situation if made to depend on every gust of faction which might prevail in the two branches of our government."[15] The Compensation Clause was designed to secure the independence of the judiciary, to the extent possible, by separating the judiciary from the other two branches.

13. The President, of course, is an exception, as his salary may be neither increased nor decreased during his term of office. U.S. Const. art. II, § 2, cl. 7.

14. Wilson, 1 *The Works of James Wilson* 296-97 (Robert Green McCloskey, ed., Belknap Press, 1967).

15. *The Constitutional Convention and the Formation of the Union* 336-337 (Winton U. Solberg ed., 2d ed. 1990) (quoting Madison's Constitutional Convention notes).

Linking Congressional and judicial pay, along with executive pay, makes judges dependent upon Congress; far from being separated, the branches are quite explicitly joined together in the blocking statutes. It would turn the doctrine of separation of powers on its head if a law that stitched together the fates of the three branches, reducing the chance that any branch would hold it unconstitutional, saved the law from being found to violate the independence of the judiciary.

This Court has scrupulously guarded against even indirect effects on judicial compensation because of the importance of safeguarding judicial independence. Even the faintest perception that Congress could influence federal judges by reducing their compensation, directly or indirectly, would undermine the legitimacy of federal judicial decisionmaking. As this Court stated in *Hatter* in explaining why discriminatory laws violate the Compensation Clause even without evidence of an intent to influence or intimidate, "judges 'should be removed from the most distant apprehension of being affected, in their judicial character and capacity, by anything, except their own behavior and its consequences.'" *Hatter*, 121 S. Ct. at 1795 (quoting Wilson, 1 *Works of James Wilson* at 364 (Robert Green McCloskey, ed., Belknap Press, 1967)). The decision of the court below failed to apply this level of vigilance in considering the effects of the blocking statutes. Indeed, perhaps because the lower court returned its decision before *Hatter*, the court failed to recognize the discriminatory impact of the blocking statutes. Because of the inconsistency between the analysis in *Hatter* and the decision below, this Court should grant review.

CONCLUSION

Congress may decide for political reasons not to increase its own pay. Political appointees also tend to serve for limited periods. A judge, however, is appointed for life and has, in all probability, taken a pay cut to perform a critical public service that is vital to the sound administration of justice. The Framers of the Constitution recognized that an independent judiciary, whose compensation could not be diminished, was essential to the effective separation of powers at the heart of civil liberties in this country, and the Compensation Clause guarantees the judiciary that independence. Congress has unconstitutionally diminished judicial salaries by passing the blocking statutes at issue in this case, and this Court must hear the matter to reestablish the constitutional guarantee of judicial independence and an undiminished compensation.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

SPENCER WILLIAMS, JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, ET AL. *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 01–175. Decided March 4, 2002 (8)

The petition for a writ of certiorari is denied.

JUSTICE BREYER, with whom JUSTICE SCALIA and JUSTICE KENNEDY join, dissenting from denial of certiorari.

The Ethics Reform Act of 1989 provides for automatic annual adjustments in judicial pay to take account of inflation. In each of fiscal years 1995, 1996, 1997, and 1999, Congress included language in appropriations legislation that prevented the Ethics Act adjustments from taking effect for that fiscal year. The petitioners in this case, federal judges sitting when the Ethics Act became law, claim that the latter legislation violates the Constitution's Compensation Clause. In my view the Compensation Clause question is both difficult and important. I would grant certiorari and hear this case.

I

On January 1, 1990, the Ethics Reform Act (Ethics Act or Act) took effect as law. Pub. L. 101–194, 103 Stat. 1716. Insofar as that statute applied to federal judges it accomplished two important objectives. First, it strictly limited the amount of outside income that any judge could earn. It forbade the receipt of honoraria, speaking or lecture fees, payments for articles, or other income earned other than by teaching or writing books. And it imposed a dollar limit (now just over $21,000) on the income a judge

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could earn through classroom teaching. 5 U. S. C. App. §§501–502.

Second, the Act sought to maintain real judicial compensation at a nearly constant level. The Quadrennial Commission on Executive, Legislative, and Judicial Salaries had told Congress that a continuous inflation-driven reduction in the real level of judicial salaries, at a time when most other real salaries in America had remained constant or increased, was "threatening to diminish the quality of justice in this country . . . ." Report of 1989 Commission on Executive, Legislative and Judicial Salaries, Fairness for our Public Servants 27 (1988). And the Congressional Bipartisan Task Force on Ethics had added that "[f]ederal judges are resigning at a higher rate than ever before." 135 Cong. Rec. 30752 (1989). Failure to protect against the negative impact of inflation, the task force stated, was "the single, most important explanation" for the increasing disparity between the salaries of high-level Government officials and comparable positions in the private sector. *Id.*, at 30753. Hence, the Act focused on inflation, assuring federal judges (as well as Members of Congress and high-level Executive Branch officials) that their real salaries, compared to those of the average worker, would decline only slightly, if at all.

The Act provided this assurance as follows: First, it said that each year "each [judicial] salary rate . . . shall be adjusted by an amount . . . as determined under section 704(a)(1) . . . ." 28 U. S. C. §461(a)(1) (1994 ed.). Second, it provided in §704(a)(1) that the adjustment amount would equal the quarterly percentage set forth in the Employment Cost Index (a measurement of change in private sector salaries published by the Bureau of Labor Statistics) minus one-half of one percent with a ceiling of five percent. *Ibid.* Third, it said that this adjustment "shall" take place whenever there was a similar adjustment in the salary of federal civil servants under "section 5303 of [Title 5]." 5 U. S. C. §5318. Fourth, it made clear

that this latter adjustment would take place annually and automatically unless the President determined that there was either (1) a "national emergency" or (2) "serious economic conditions affecting the general welfare." §5303(b)(1).

The Act mandates adjustments to judicial salaries; the adjustments are mechanical and precise; and they are to take place automatically, for they are tied to the adjustments provided to General Schedule employees which themselves are automatic but for the two possible exceptions. These features of the law assured federal judges, as I have said, that their real salaries would stay approximately level unless the real salaries of the average private sector worker or those of the typical civil servant declined significantly as well.

The adjustments for which the Ethics Act provided took effect as required by the Act in fiscal years 1991, 1992, 1993, and 1998. In fiscal year 1994 the President applied the special circumstance exception, invoking "serious economic conditions" (namely, huge budget deficits) as a basis for denying General Schedule employees an adjustment and consequently federal judges received no adjustment in their salaries either. In each of fiscal years 1995, 1996, 1997, and 1999, however, the adjustment in the salaries of General Schedule employees took effect. But the related adjustment in the salaries of federal judges did not take effect. That is because, in each year, Congress included in its appropriations legislation language specifying that, other laws to the contrary notwithstanding, the salaries of Members of Congress, certain high-level Executive Branch employees, and federal judges would not be adjusted. Pub. L. 103–329, §630(a)(2), 108 Stat. 2424; Pub. L. 104–52, §632, 109 Stat. 507; Pub. L. 104–208, §637, 110 Stat. 3009–364; Pub. L. 105–277, §621, 112 Stat. 2681–518.

In 1997, a group of federal judges, all members of the

Federal Judiciary prior to 1989, filed this lawsuit against the United States. The judges argued that the first three special "blocking laws" diminished their compensation in violation of Article III's command. The District Court agreed and granted summary judgment in the judges' favor. The same judges then filed a similar suit based on the fourth blocking law, which had now taken effect, and the District Court granted them summary judgment on this suit as well. The United States appealed, and the cases were consolidated. The Court of Appeals reversed in a 2-to-1 panel decision. 240 F. 3d 1019 (CA Fed. 2001). The judges now seek certiorari.

II

The judges argue that the appropriations legislation blocking the Ethics Act adjustments violates the literal language of the Compensation Clause and runs contrary to its basic purposes. In respect to the language, they point out that the Clause says that judges "shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U. S. Const., Art. III, §1. The Ethics Act, they say, sets forth the level of "compensation" that judges "shall . . . receive" at a "stated time," *i.e.*, each year. The subsequent appropriations legislation "diminished" that fixed "compensation" by removing the previously legislated adjustment. And it did so during the plaintiff judges' "continuance in office."

Moreover, the judges argue, the blocking statutes represent precisely the kind of legislation that the Compensation Clause was designed to prohibit. The Founders wrote the Compensation Clause in order to help ensure "complete independence of the courts of justice." The Federalist No. 78, p. 466 (C. Rossiter ed. 1961) (A. Hamilton). As Hamilton explicitly stated, "[n]ext to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support." *Id.*, No. 79, at 472. A "power over a man's subsistence," Hamilton added, "amounts to a power over his will." *Ibid.* (emphasis deleted).

Moreover, when the Founders considered the Constitution's specific provisions, they took inflation into account. Hamilton, fully aware of then-prevalent inflation, wrote that "fluctuations in the value of money and in the state of society rendered a fixed rate of compensation in the Constitution inadmissible." *Id.*, at 473. For that reason, he insisted that the Constitution "leave it to the discretion of the legislature to vary its provision in conformity to the variations in the circumstances." *Ibid.* But once the legislature has chosen to vary a provision, he added, the Compensation Clause "put[s] it out of the power of that body to change the condition of the individual for the worse." *Ibid.* The reason is that a judge must "be sure of the ground upon which he stands and . . . never be deterred from his duty by the apprehension of being placed in a less eligible situation." *Ibid.* In a nutshell, the Founders created a one-way compensation ratchet because they believed that permitting the legislature to diminish judicial compensation would allow the legislature to threaten judicial independence.

Three examples will help illustrate how, in the judges' view, the appropriations legislation undermines these basic Compensation Clause objectives:

Example One assumes that Congress has enacted a statute taking effect on January 1, 2000, specifying that federal district court salaries for the next five years shall be paid according to the following schedule:

2000	$150,000
2001	$150,000
2002	$150,000
2003	$150,000
2004	$150,000

Example Two assumes that Congress, believing that inflation is likely to occur, has enacted a statute taking effect on January 1, 2000, specifying that federal district court salaries for the next five years shall be paid according to the following schedule:

2000	$150,000
2001	$160,000
2002	$170,000
2003	$180,000
2004	$190,000

Example Three is a simplified version of the present case. It assumes a statute that specifies a mechanically determined adjustment for inflation (yielding a, b, c, and d dollars) added on to the fiscal year 2000 salary each year according to the following table:

2000	$150,000
2001	$150,000 + a
2002	$150,000 + a + b
2003	$150,000 + a + b + c
2004	$150,000 + a + b + c + d

Example One presents circumstances where Congress could not subsequently (say, in 2003) reduce the pay of previously sitting federal judges below the amount previously specified for that year ($150,000). But what about Example Two and Example Three? It is difficult to see any difference between a later statute, enacted, say, in 2003, that removes Example Two's $10,000 increase due in 2004, and a similar statute that removes Example Three's increase of mechanically determined amount "d." Those two examples would seem virtually identical from a constitutional point of view.

But does the Compensation Clause distinguish Example One from Examples Two and Three? The lower court answered this question affirmatively. Its answer assumes

that the Constitution forbids only a reduction in the nominal dollar rate of pay that a judge actually has earned for at least some minimal period of time.

The judges concede that such a reading is possible logically. But they point out that that reading, in significantly restricting the protective scope of the Compensation Clause, would mock Hamilton's claim that the Constitution (while granting to Congress the power to decide when to *increase* a judge's nominal pay) "put[s] it out of the power" of Congress "to change the condition of the individual for the worse." *Ibid.* That is because the three examples are virtually identical in terms of the Compensation Clause's basic purposive focus: a judge's reasonable expectations. A sitting judge has no greater, and no lesser, reason to believe he will receive the amounts provided in Examples Two and Three than the amount provided in Example One. Assuming in each case that a statute already in effect has similarly determined, fixed, and mandated the figures listed in the schedule, a judge similarly will expect to receive the salary that the statute mandates. And any subsequent reduction in the amounts contained in any of the three statutes would similarly diminish the judge's compensation below the level that the law had previously entitled that judge to expect. Cf. *United States* v. *Hatter*, 532 U. S. 557, 585 (2001) (SCALIA, J., dissenting) (arguing that repeal of judges' exemption from Medicare tax constituted diminishment in compensation because judges "had an employment expectation of a preferential exemption from taxation. . ."); *ibid.* ("This benefit Congress took away, much as a private employer might terminate a contractual commitment to pay Medicare taxes on behalf of its employees"). Moreover, the expected level here is a level that does not increase a judge's real salary; it simply keeps that real salary from being reduced.

The federal appeals court majority did not reject this

argument directly on the merits. Rather, it wrote that this Court had rejected the argument in *United States* v. *Will*, 449 U. S. 200 (1980), a unanimous decision, and it did not believe it could re-open the issue. 240 F. 3d, at 1035. In *Will* the Court considered "when, if ever, . . . the Compensation Clause prohibit[s] the Congress from repealing salary increases that otherwise take effect automatically pursuant to a formula previously enacted." 449 U. S., at 221. The Court held that Congress could block a "cost-of-living" increase due judges (under pre-existing law) because the blocking legislation took effect in the fiscal year prior to the year in which the increase would become payable. And the Court wrote that "a salary increase 'vests' . . . only when it takes effect as part of the compensation due and payable to Article III judges." *Id.*, at 229. This language and holding, in the Court of Appeals' view, distinguishes Example One from Examples Two and Three, offering protection in Example One, but not in either of the latter two examples.

The judges, however, offer a strong argument distinguishing *Will* in terms of the Compensation Clause's basic, expectations-related purpose. *Will* involved a set of interlocking statutes which, in respect to future cost-of-living adjustments, were neither definite nor precise. The statute providing for judicial cost-of-living adjustments, like the statute now before us, tied those adjustments to adjustments provided others in the civil service. But the civil service statute, unlike the comparable statute here before us, was imprecise as to amount and uncertain as to effect. The *Will* statutes required the President to appoint an adjustment agent. The agent was to compare salaries in the civil service with those in the private sector and then recommend an adjustment to an Advisory Committee. Subsequently the Committee would make its own recommendation to the President, accepting, rejecting, or modifying the agent's recommendation as the Committee

thought desirable. The President would have to accept the Committee's recommendation—unless he determined that national emergency or special economic conditions warranted its rejection. But that recommendation would not take effect as law if either House of Congress rejected it. See *id.*, at 203–204.

Put in terms of the Compensation Clause's basic purpose, the judges argue that the *Will* statutes created a series of hurdles that prevented those statutes from creating a firm judicial expectation that the statutes' potential beneficiaries, *e.g.*, sitting judges, would in fact receive any inflation-compensating adjustment. Neither did the statutes provide for calculation of any such adjustment in a mechanical way.

The judges add two further subsidiary distinctions: (1) The Ethics Act, unlike the statutes in *Will*, simultaneously eliminated other (outside) income that judges had previously received, 5 U. S. C. App. §§501–502; and (2) the Ethics Act, unlike the statutes in *Will*, was directly intended to protect judges from "riders to appropriations bills to deny them COLAs when other Federal employees receive theirs." 135 Cong. Rec., at 30753.

The judges recognize that the Ethics Act does not fix salaries quite as definitively as hypothetical Example Three suggests. That is because the Act's adjustment will not take place if the President determines that there exists either a "national emergency" or "serious economic conditions affecting the general welfare," and then reduces or eliminates General Schedule salary adjustments accordingly. But these circumstances, they argue, are defined precisely enough and are uncommon enough not to affect expectations significantly. In any event, that, according to the judges, is the question that this Court must decide—whether the 1989 statute is sufficiently precise and definite to have created an "expectation" that the Compensation Clause protects. Cf. *Boehner* v. *Anderson*,

30 F. 3d 156 (CADC 1994) (finding equivalent of such "vesting" for purposes of the Twenty-seventh Amendment in Ethics Act's adjustment provision as it applied to Members of Congress).

In my view, the Court in *Will* did not focus on this question. To read that opinion as the lower court read it would render ineffectual any congressional effort to protect judges' real compensation, even from the most malignant hyperinflation, Hamilton's views to the contrary notwithstanding. Indeed, that reading would permit legislative repeal of even the most precise and definite salary statute—any time before the operative fiscal year in which the new nominal salary rate is to be paid. I very much doubt that the Court in *Will* intended these consequences.

The Government alternatively claims that §140 of a fiscal year 1982 appropriations bill, Pub. L. 97–92, 95 Stat. 1200, provides a separate basis for rejecting the judges' claim. I do not see how that is so. Section 140 provides in relevant part:

> "Notwithstanding any other provision of law . . . none of the funds appropriated by this joint resolution or by any other Act shall be obligated or expended to increase, after the date of enactment of this joint resolution, any salary of any Federal judge or Justice of the Supreme Court, except as may be specifically authorized by Act of Congress hereafter enacted."

This provision refers specifically to federal judges, and it imposes a special legislative burden upon their salaries alone. The singling out of judges must throw the constitutionality of the provision into doubt. *Hatter*, 532 U. S., at 564 (striking down as unconstitutionally discriminatory the imposition of a Social Security payroll tax upon a small group of federal employees consisting "almost exclusively of federal judges"). Regardless, the Government fails to explain how, in light of the fact that the Ethics Act "specifically authorized" (indeed mandated) future adjustments in judicial pay, the language of §140 (enacted in 1981) could make a legal difference. The Government adds that Congress reenacted this 1982 provision in 2001. But it does not explain how that reenactment could affect the years here at issue.

For these reasons, I believe the judges have raised an important constitutional question, the answer to which at present is uncertain.

III

I recognize that not every petition raising a difficult constitutional question warrants review in this Court. And there are prudential considerations that some might believe warrant denying certiorari here. For one thing, we face the serious embarrassment of deciding a matter that would directly affect our own pocketbooks; and, in doing so, we may risk the public's high opinion of the Court insofar as that opinion rests upon a belief that its judges are not self-interested. But the law requires judges to decide cases in which they have a self-interest where, as here, "'no provision is made for calling another in, or where no one else can take his place.'" *Will*, 449 U. S., at 214 (quoting *Philadelphia* v. *Fox*, 64 Pa. 169, 185 (1870)). Nor should judges, who are called upon to protect the least popular cause and the least popular person where the Constitution demands it, be moved by potential personal embarrassment. Whenever a court considers a matter where public sentiment is strong, it risks public alienation. But the American public has understood the need and the importance of judges deciding important constitutional issues without regard to considerations of popularity.

One might also argue that the matter is not important enough to consider now, because over time Congress will deal with the decline in judicial compensation, making

good on the 1989 Act's inflation-adjustment promise—that real judicial salaries will not fall significantly unless those of the typical American worker or the typical civil servant decline significantly as well. The implementation of the Ethics Act, however, does not support this view. Since 1989 Congress has refused to follow the Act's mandate about half the time. The real salaries of district court judges have declined about 25 percent in the past several decades. The American Bar Association, the Federal Bar Association, and the American College of Trial Lawyers, in support of the petitioner judges, tell us that, while real judicial compensation fell below that of typical mid-level (and a few first-year) law firm associates, many law school teachers and administrators, the real compensation earned by the average private sector worker has increased, as has that in nearly all employment categories outside high levels of Government. See Appendix, *infra*. See also Fisk, What Lawyers Earn, National Law Journal, Oct. 2, 2000, p. A31; 2001 Society of American Law Teachers Equalizer, Issue 1, p. 2 (Apr. 2001). The consequence, in the professional organizations' view, is that compensation-related judicial resignations have reached an all time high, a particularly serious matter given rapidly rising caseloads. Cf. The Federalist No. 78, at 471–472 (stressing importance of professional experience).

The Compensation Clause, of course, is not concerned with the absolute level of judicial compensation. Judges are paid significantly more than most Americans and no less than Members of Congress and many other high-level Government workers. It is up to Congress to decide what that level of pay ought to be. But this case is not about what judges' labor should be worth. It is about a congressional decision in 1989 to protect federal judges against undue *diminishment* in real pay by providing cost-of-living adjustments to guarantee that their salaries would not fall too far behind inflation. Cf. REHNQUIST, C. J., 2001 Year-End Report on the Federal Judiciary 2 (Jan. 1, 2002) ("But a COLA only keeps judges from falling further behind the median income of the profession"). This congressional decision was tempered only with the caveat that judges would not be protected against salary diminishment if such protection would give judges a benefit that the average American worker and the average federal employee had been denied. The Compensation Clause assures judges that, once Congress has made such a decision, a later Congress cannot overturn it. This is not a novel concept; it has been engrained since the Founders drafted the Clause to protect against the risk that Congress would attempt to change the conditions of judges "for the worse." The Federalist No. 79, at 473 (A. Hamilton).

Congress, of course, has treated judges no worse than it has treated itself. It has cut its own real salaries just as it has cut those of the judges. And its doing so may well work similar harm upon all Federal Government institutions. The Compensation Clause, however, protects judicial compensation, not because of the comparative importance of the Judiciary, but because of the special nature of the judicial enterprise. That enterprise, Chief Justice Marshall explained, may call upon a judge to decide "between the Government and the man whom that Government is prosecuting; between the most powerful individual in the community and the poorest and most unpopular." Proceedings and Debates of the Virginia State Convention of 1829–1830, p. 616 (1830). Independence of conscience, freedom from subservience to other Government authorities, is necessary to the enterprise. The Compensation Clause helps to secure that judicial independence. When a case presents a serious Compensation Clause question, as this case does, we should hear and decide it.

IV

To summarize: this case focuses upon monetary infla-

tion—a phenomenon familiar to the nation's founders, but absent during much of the Nineteenth Century. By reducing the purchasing power of salaries specified in fixed dollar amounts, inflation leaves it to Congress to determine whether a judge's standard of living will be reduced or maintained. The judges concede that the Compensation Clause *itself* does not require periodic re-adjustment of judicial salaries in order to maintain their real value. The question in the present case is whether that Clause offers protection when Congress *chooses* to promise a stable purchasing power.

Here, Congress, not the Constitution, wrote the guarantee at issue. It enacted a statute promising that real federal judicial salaries will be essentially maintained, but only if and insofar as *both* (1) the average worker *and* (2) the average civil servant also have seen their own real salaries maintained. The constitutional question is whether the Compensation Clause permits a later Congress to renege on that commitment. The court below held, in effect, that there is no way in which Congress can assure prospective judges that the purchasing power of their promised salary will be maintained: any commitment by one Congress (even one accompanied by a reduction in judges' permissible outside income) can be repudiated by a later Congress, no matter how serious the inflation-produced erosion of real compensation. For the reasons set forth, I believe that holding may well be wrong. And because I believe the question an important one, I would grant the writ of certiorari.

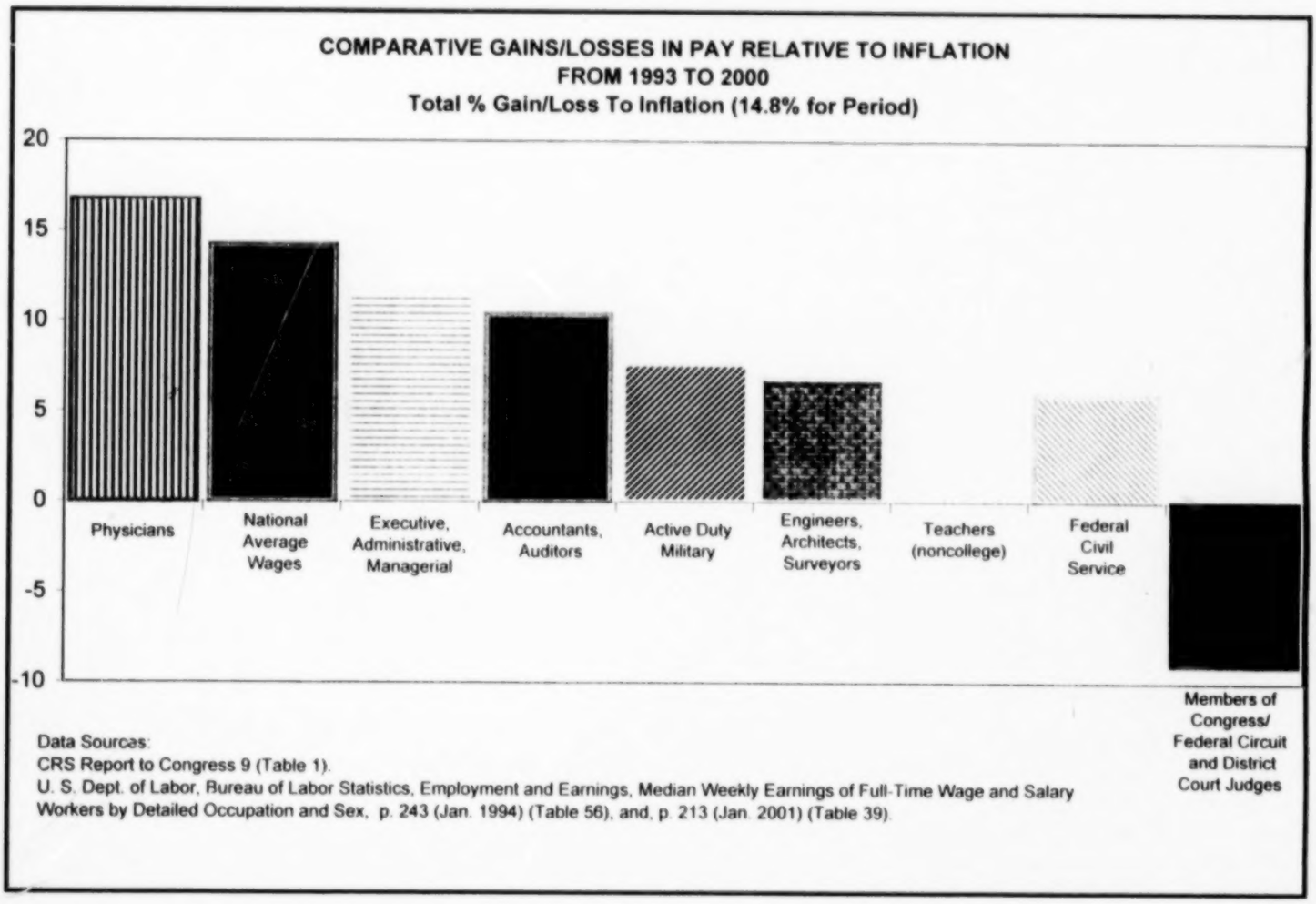
APPENDIX TO OPINION OF BREYER, J.
CHART A

DECLINE IN JUDGES' SALARIES COMPARED TO PRIVATE SECTOR WAGE GAINS
ADJUSTED FOR INFLATION
Annual % Change Since 1969

Data Sources:
Inflation based on the CPI-U Index from the Bureau of Labor Statistics
Circuit and District Court Judge Salaries: American Bar Association and Federal Bar Association, Federal Judicial Pay Erosion: A Report on the Need for Reform 9 (Feb. 2001) (Chart A)
National Average Wages/Salaries: P. Purcell, CRS Report to Congress, Pay and Retirement Benefits for Federal Civil Service and Military Personnel Increases from 1969 to 2000, p. 9 (Mar. 20, 2000) (Table 1) (CRS Report to Congress).

Prepared by: Administrative Office of the U. S. Courts

APPENDIX TO OPINION OF BREYER, J.
CHART B



Prepared by: Administrative Office of the U. S. Courts

APPENDIX TO OPINION OF BREYER, J.
CHART C